(26,165)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 698.

P. D. CAMP, P. R. CAMP, AND JOHN M. CAMP, PETITIONERS,

vs.

MORGAN V. GRESS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 3, 1917.

1 TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

At a District Court of the United States for the Eastern District of Virginia, Begun and Held at the Court-room in the Court-house and Post Office Building, in the City of Norfolk, Virginia, on the First Monday in the Month of November, Being the Sixth Day of the Same Month, in the Year of Our Lord One Thousand Nine Hundred and Sixteen.

Present: The Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

Declaration.

Filed April 5th, 1915.

MORGAN V. GRESS, a Resident and Citizen of the State of Florida, Plaintiff,

v.

P. D. CAMP, P. R. CAMP, and JOHN M. CAMP, Residents and Citizens of the State of Virginia, Defendants.

Trespass on the Case. In Assumpsit.

Morgan V. Gress, Plaintiff, complains of P. D. Camp, P. R. Camp, and John M. Camp, Defendants, of a plea of trespass on the case in assumpsit, for this, to-wit: Heretofore on the 18th day of August, 1913, during all of the times hereinafter mentioned in this declaration, the said Morgan V. Gress was and now is a resident and citizen of the State of Florida; that the matter in dispute in this suit exceeds, exclusive of interest and costs the sum and value of $2,000.00; that said defendants were on the said August 18th, 1913, and during all of the times mentioned in this declaration, and now are residents and citizens of the State of Virginia, and of and in the County
2 of Southampton. On August 18th, 1913, the said Morgan V. Gress, of the first part, and the said P. D. Camp, P. R. Camp, and John M. Camp, parties of the second part, for good and valuable consideration moving between them entered into, executed in duplicate and delivered interchangeably between them as party of the first part and parties of the second part, respectively, a certain written contract in words, figures and tenor and substance as follows:

"This Agreement, Made this 18th day of August, 1913, between Morgan V. Gress, of Jacksonville, Florida, party of the first part, and P. D. Camp, P. R. Camp, and John M. Camp, of Franklin, Virginia, parties of the second part;

Whereas: The said Morgan V. Gress has a large Saw Mill Plant at Jacksonville and desires to arrange for standing timber to be manufactured at said Plant; and

Whereas: Said parties of the second part have a large lot of standing timber in Levy County, Florida, which they desire to have manufactured into lumber; and

Whereas: Said party of the first part and said parties of the second part have decided that under the circumstances above recited that it will be best for them to unite their respective properties in order that the said properties may be best utilized;

Now, Therefore, this Agreement Witnesseth: That said party of the first part and said parties of the second part, in consideration of the mutual covenants and agreements herein contained, hereby agree together, and bind themselves, their assigns and personal representatives, as follows:

First. That the parties to this agreement will secure a Charter for, and organize, a joint Stock Company with a capital of $9,000.00 to be known as the Levy County Lumber Company, for the purpose of purchasing the Mill Plant and timber mentioned in the above preamble, and manufacturing the said timber.

Second. That in consideration of $2,500.00 par value of the stock of the said Company, the said Morgan V. Gress agrees and binds himself to convey to the said Company his entire Mill Plant at Jacksonville, Florida, on the St. John's River, including all buildings, machinery and structures of every kind (but not 3 the tract of land upon which said Mill Plant is located) the said Mill Plant being located on a tract of land containing about fifty-one acres, fully described as follows: The tract of land conveyed to the said Morgan V. Gress, by Hillman-Sutherland Company, by deed dated the 10th day of June, 1909, and recorded in the records of Duval County, Florida, in Deed Book #56, page 84, except Nine acres of said tract conveyed to the South-Side Realty Company by Morgan Lumber Company by deed dated October 19th, 1909, and recorded in said County in Deed Book #60, page 480. It being understood that the title to the said Mill Plant and property is now in Morgan Lumber Company which will make conveyance to the Levy County Lumber Company. It is understood that the Mill Plant above referred to includes all Mill buildings, Store buildings, Offices, Dwellings, Docks, Dry Kilns, Railroad Iron (except that leased from the Atlantic Coast Line Railway Co.), Boilers, Machinery and all property and structures of every kind located on the tract of land above described, except the lumber, logs and cross ties (which are now under the railroad tracks), stocks of merchandise, logging machinery and old machinery not needed nor not now being used in the operation of the Mill. It is understood that all riparian rights belonging with the said land shall go with said Mill Plant and be used by the said

Company, its assigns or successors, operating said Mill. It is agreed that the estimated value of said Mill Plant and rights thus conveyed is $125,000.00.

Third. Said parties of the second part agree that in consideration of the $6,500.00 par value of the stock of said Company they will convey to said Company all of the timber and rights, privileges, licenses and easements connected therewith, located in Levy County, Florida, which was conveyed to John Walter West by the Florida Syndicate, Limited, by deed dated on the 9th day of February, 1900, and recorded in the public records of Levy County, Florida, in Deed Book "T," page 54, and was conveyed by the said John Walter West to Wm. N. Camp by deed dated the 1st day of January, 1903, and recorded in the said office in Deed Book "V," at pages 1 to 7, inclusive, reference being hereby made to both said deeds for a further description of said timber and rights, all of said timber and rights having, since the dates of said deeds, become vested by successive conveyances in the parties of the second
4 part. It is understood, however, that a small portion of said timber was cut and removed by the Dunnellon Phosphate Company, and also that portion of same on the Atlantic Coast Line Railway Company's right-of-way through the said timber has been cut and removed. The estimated value of said timber is agreed to be $325,000.00.

Fourth. Said Morgan V. Gress shall warrant generally title to the Mill Plant and rights which he agrees to convey as above stated, and said parties of the second part shall warrant generally the title of the timber and rights which they agree to convey as above stated.

Fifth. Said Morgan V. Gress agrees, and hereby grants to the said proposed Company an option until the 1st day of October, 1915, to buy the tract of land, containing about fifty-one acres, upon which the said Mill Plant is located together with all right and privileges incident thereto, at the price of $75,000.00, to be paid or secured in such a way as shall be satisfactory to Morgan V. Gress. It is further agreed that until the said Company purchases the said land under this option the said Company shall pay rent for the use of said land, the sum of $375.00 per month payable monthly, from and after the first day of October, 1913, and if the said Company does not purchase the said land under the above option, then the said Morgan V. Gress agrees to lease to the said Company and does hereby lease to it, the said tract of land for a further period of one year after the 1st day of October, 1915, at a rental of $375.00 per month to be paid monthly, with the privilege to the said Company, its assigns or successors, to continue the said lease after the expiration of said one year, that is, after the 1st day of October, 1916, for such further time as it desires to retain the said property, but not longer than the 1st day of October, 1913, with the privilege, however, to surrender the said lease at the end of any year during said period by giving six months' notice before the end of said year to the said Morgan V. Gress, his heirs, assigns or personal representatives, of the intention of said Company to

surrender said lease. Provided, however, that at least six and one-half months before the end of each year the said Morgan V. Gress shall inquire in writing of the said Company whether the said Company desires to continue said lease longer than the end
5 of said year or not and if the said Morgan V. Gress shall fail to address such inquiry to said Company, then the said Company shall at the end of said year be at liberty to discontinue the said lease whether it shall have given six months' notice or not to the said Morgan V. Gress of its intention of discontinuing the said lease. The payment of rent under this covenant shall not be considered as a condition precedent to the continuation of said lease and rights, but shall be construed as a mere covenant to pay on the part of the said Company, and failure to pay said rent when due by said Company shall not operate as a forfeiture of the said lease.

Sixth. The said parties to this agreement hereby covenant to furnish the said Levy County Lumber Company all the money or capital necessary for the use of said Company in conducting its business, said money to be furnished by said parties in proportion to the amount of Stock in said Company owned by each at the beginning, as above indicated, and it is to be loaned to the said Company on its unsecured notes.

Seventh. If at any time there shall be any disagreement between the minority and majority of Stockholders of said Company as to the amount of salary to be paid to any of the officers of the Company then such disagreement shall be settled by arbitration.

Eighth. The Charter of said Company and the conveyances to be made to the same shall be secured and made, and the Company organized, on or before the 1st day of December, 1913.

This contract is made and executed in duplicate, a copy being retained by each party hereto.

(Signed)	P. D. CAMP.	[SEAL.]
"	P. R. CAMP.	[SEAL.]
"	JOHN M. CAMP.	[SEAL.]
"	MORGAN V. GRESS.	[SEAL.]

And for that the said Morgan V. Gress was on the said 18th day of August, 1913, and during all of the times stated in this declaration, able, ready and willing to do and perform all and singular the covenants, obligations and agreements recited and contained in said contract of August 18th, 1913, and by the terms of that contract
6 imposed upon him, the said Morgan V. Gress, and this was well known to defendants. And for that the said defendants, P. D. Camp, P. R. Camp, and John M. Camp, on, to-wit, December 5th, 1914, and on December 31st, 1914, and thereafter, breached, ignored, repudiated and declined further to recognize, abide by or perform the said contract of August 18th, 1913, or any part thereof, and so advised the plaintiff. On August 18th, 1913, the saw mill plant at Jacksonville, Florida, on the St. John River, with the buildings, machinery and fixtures in said contract of August 18th, 1913, de-

scribed, together with the option to purchase the lands therein described, and together with the leasehold estate by said contract created in the lands in said contract described, and to be conveyed to the proposed Levy Lumber Company by plaintiff, were of the value of $125,000. That on, to-wit, December 5th and 31st, 1914, and thereafter, and now the value of the timber and rights, privileges and easements connected therein in Levy County, Florida, described in said contract of August 18th, 1913, and provided by the terms of that contract to be conveyed to the proposed Levy County Lumber Company by defendants, was and is of the fair cash market value and equivalent of $490,000. The fair cash market value of the said saw mill plant, including all store-, buildings, offices, dwellings, dry kilns, and options, leasehold estates and other privileges and property described in said contract of August 18th, 1913, and proposed to be conveyed by the plaintiff to the proposed Levy County Lumber Company, exclusive of the fifty-one acres on which said plant is located, is now $25,000. It was provided by said contract of August 18th, 1913, that Morgan V. Gress was to receive $2,500 par value of the stock of the proposed Levy County Lumber Company, and the defendants P. D. Camp, P. R. Camp and John M. Camp were to receive $5,500 par value of the stock of the said proposed Levy County Lumber Company. The said defendants on, to-wit: December 5th, and 31st, 1914, and continuously thereafter repudiated in its entirety, and declined to perform or abide by, or in anywise be bound by any or all the terms of said contract of August 18th, 1913, then, there and thereby became due, and are now liable to the plaintiff, Morgan V. Gress, for the difference between the estimated agreed and actual value on August 18th, 1913, of the said saw mill plant, property and privileges agreed to be conveyed to the proposed Levy County
7 Lumber Company, and the actual value of said plant, property and privileges on December 5th and 31st, 1914, and now which difference in value was and is, to-wit: $100,000. The timber, privileges and easements contracted by defendants on August 18th, 1913, to be conveyed to the proposed Levy County Lumber Company, which were estimated and agreed on on said August 18th, 1913, to be and which then were, of the fair value of $325,000, were on December 5th and 31st, 1914, and now are of the fair cash value of $490,000; the said plaintiff, Morgan V. Gress, was and is entitled to receive of the said enhanced value of said timber, privileges and easements, contracted to be conveyed by the defendants to the proposed Levy County Lumber Company such a proportion thereof as $2,-500—par value of the stock of the proposed Levy County Lumber Company bears to $9,000.00, the entire stock of said proposed Levy County Lumber Company, to-wit: the sum of $45,833.34, and for that on August 18th, 1913, Morgan V. Gress, the plaintiff, owned and controlled the capital stock of the Morgan Lumber Company, described in said contract, and owned and controlled approximately 90,000,000 feet of yellow pine stumpage, within twenty-five miles of the said saw mill plant of the said Morgan Lumber Company at Jacksonville, Florida, with a freight rate by water to said saw mill plant

of, to-wit: seventy-five cents per thousand; that after the making of said contract of August 18th, 1913, providing by its terms a large timber supply for a great number of years for the said saw mill plant of said Morgan Lumber Company, located at Jacksonville, Florida, to-wit: 160,000,000 feet of yellow pine stumpage, to be conveyed to the proposed Levy County Lumber Company, the —Morgan V. Gress, with knowledge and acquiescence of the defendants, and acting upon the faith and in the confidence that the said contract of August 18th, 1913, would be by the defendant- faithfully performed, sold, conveyed and otherwise disposed of the entire 90,000,000 feet of yellow pine stumpage above described, which was tributary to, and acquired for manufacture at said plant of said Morgan Lumber Company; that it is not practicable or possible for plaintiff to obtain a log or timber supply for manufacture at the said saw mill plant at Jacksonville, Florida, and that the conditions with respect to log supply for that plant were well known to the defendants at the making of the contract of August 18th, 1913, and the fact that said plant had
8 been deprived of its log supply, as aforesaid, was well known to the defendants, and each of them when the said contract of August 18th, 1913, was breached and repudiated. And for that the defendants are further indebted to the plaintiff, by terms of said contract of August 18th, 1913, in the sum of $5,625.00, representing the monthly rental of the mill site in said contract described at $375.00 per month, from October 1st, 1913, to December 31st, 1914, and all of which is unpaid; and the further sum of $6,352.00, representing payments and disbursements made by the plaintiff for fire insurance, watchman's payrolls, and current repairs on and in connection with the saw mill plant and buildings covered by the said contract of August 18th, 1913.

Wherefore, the plaintiff, Morgan V. Gress, brings this his suit, against the defendants, P. D. Camp, P. R. Camp and John M. Camp, and complaining says that the defendants are indebted to him in the sum of $157,808.34, for which sum, with interest thereon from January 1st, 1914, and costs the plaintiff prays judgment of and in this court.

W. M. TOOMER,
Attorney for Plaintiff, Morgan V. Gress.

Plea to Jurisdiction.

Ordered and Filed May 17, 1915.

John M. Camp, one of the above named defendants, appearing specially under protest for the purpose of this plea and for no other purpose, comes and says that this court ought not to have or take any further cognizance of the action aforesaid of the said plaintiff because this defendant says that he is not a citizen, resident or inhabitant of the Eastern District of Virginia, nor was he such at the time of the institution of the above entitled cause; and that he does not reside therein; but that he is a citizen, resident and inhabitant

of the Eastern District of the State of North Carolina, and was such at the time of the institution of the above entitled action, and for a long time prior thereto; and further says that as appears by the declaration filed in the said above entitled cause, the said plaintiff, Morgan V. Gress, is not a citizen, resident or inhabitant of the said Eastern District of Virginia, nor was he such at the time of the above institution of the entitled cause, nor does he reside therein, but
9 that he, the said plaintiff, is a citizen, resident and inhabitant of the State of Florida, and was such at the time of the institution of the above entitled cause, and for a long time prior thereto, and this this defendant is ready to verify. And the said John M. Camp respectfully sets up, pleads and relies upon the exemption from suit in any other District than that in which he resides, conferred upon him by the statutes and laws of the United States; and he here and now respectfully objects to being sued in the Eastern District of Virginia, and protests that this Court is without jurisdiction and declines to submit to the jurisdiction of this court or consent to the maintenance of this cause.

Wherefore, he prays judgment whether this court can or will take any further cognizance of the action aforesaid.

JOHN M. CAMP,
By COUNSEL.

R. E. L. WATKINS.
PEATROSS & SAVAGE, *p. d.*

STATE OF NORTH CAROLINA,
Duplin County, To wit:

John M. Camp, being duly sworn according to law, *and* says, that he is one of the defendants in *that* above entitled action, and that the matters and things stated in the foregoing plea are true to the best of his knowledge and belief, and that the foregoing plea is true in point of fact and is not interposed for delay.

J. M. CAMP.

Subscribed and sworn to before me this 15th day of May, 1915.

B. F. PEARSALL, JR.,
Notary Public.

My commission expires on the 27th day of November, 1916.

I hereby certify that the foregoing plea is, in my opinion, well founded in point of law.

T. D. SAVAGE,
Of Counsel for Defendant.

10 *Plea to Jurisdiction.*

Filed May 17th, 1915.

P. D. Camp and P. R. Camp, two of the above named defendants, appearing specially under protest for the purpose of this plea and for

no other purpose, come and say that this court ought not to *to* have or take any further cognizance of the action aforesaid of the said plaintiff because John M. Camp, one of the above named defendants is not a citizen, resident or inhabitant of the Eastern District of Virginia, nor was he such at the time of the institution of the above entitled cause; and that he does not reside therein, but that he is a citizen, resident and inhabitant of the Eastern District of the State of North Carolina, and was such at the time of the institution of the above entitled action, and for a long time prior thereto, and that the said John M. Camp has not consented to being sued in the Eastern District of Virginia, but has declined to submit to the jurisdiction of this court and further say that as appears by declaration filed in the above entitled action, the said plaintiff, Morgan V. Gress, is not a citizen, resident or inhabitant of the said Eastern District of Virginia, nor was he such at the time of the institution of the above entitled cause, nor does he reside therein, but that he, the said plaintiff, is a citizen, resident and inhabitant of the State of Florida, and was at the time of the institution of the above entitled cause, and for a long time prior thereto.

And these defendants say that the alleged cause of action set out in the declaration of the plaintiff is a joint and inseparable cause of action against these defendants and the said John M. Camp, and is based on a joint contract as set out in the declaration, and that no action can be based thereon against these defendants, unless the said John M. Camp is a party thereto. And these defendants respectfully protest that this court is without jurisdiction to try the said case without having the said John M. Camp properly before the court. And this, these defendants are ready to verify.

Wherefore, they pray judgment whether this court can or will take any further cognizance of the action aforesaid.

P. D. CAMP AND
P. R. CAMP,
By COUNSEL.

R. E. L. WATKINS.
PEATROSS & SAVAGE, *p. d.*

11 STATE OF VIRGINIA,
Isle of Wight County, To wit:

P. D. Camp, being duly sworn according to law, deposes and says that he is one of the defendants in the above entitled action and that the matters and things stated in the foregoing plea are true to the best of his *ac*knowledge and belief, and that foregoing plea is true in point of fact and is not interposed for delay.

P. D. CAMP.

Subscribed and sworn to before me this 15th day of May, 1915.

C. W. GARY.,
Notary Public.

I hereby certify that the foregoing plea is, in my opinion, well founded in point of law.

T. D. SAVAGE,
Of Counsel for Defendants.

Motion to Strike Out Plea.

Filed July 5th, 1915.

Comes now the Plaintiff, Morgan V. Gress, in the cause and Court above stated and after the filing of a plea by the Defendant, John M. Camp, to the jurisdiction of this Court in this cause, and moves to strike out said plea to the jurisdiction interposed by the said John M. Camp and on the following grounds, that is to say:

A. Because said plea is bad in substance and insufficient in law.

B. Because the facts pleaded in said plea raise no legal, valid or sufficient objection to the jurisdiction of this Court in this cause over the said Defendant, John M. Camp.

C. Because it appears from an inspection of said plea and the declaration filed in said cause and the return of the U. S. Marshal upon the summons issued therein, and from the acknowledg-
12 ment of the service made by the said John M. Camp on said summons, that the jurisdiction of this Court in this cause against the said John M. Camp, was properly acquired and should be maintained.

D. Because said plea to the jurisdiction is not limited by its terms to the question of the jurisdiction of this Court in this cause over the person of the said John M. Camp, but is addressed to and chal-enges the jurisdiction of this Court in this cause over all of the defendants and as to the entire cause of action of the plaintiff.

E. Because said plea to the jurisdiction does not negative the several defendants in said suit, was found within the Eastern District of Virginia when said suit was filed, or when summons issued therein with copy declaration attached was served, or when the said Defendant acknowledged service thereon.

F. Because it appears from an inspection of the summons issued and returned in this cause and now filed in this Court the Defendant, John M. Camp on the 26th day of April, 1915, acknowledged service, presumably, within the said Eastern District of Virginia of a copy of the said summons issued herein with copy of declaration attached and the said John M. Camp being one of several defendants in this suit at law and being found within the said Eastern District of Virginia, the said plea to the jurisdiction and in abatement of this cause of action should be quashed, stri-ken and denied.

Upon the foregoing motion to strike out said plea, the Plaintiff prays the judgment of this Court and that this cause may thereupon proceed in due course.

W. M. TOOMER,
Plaintiff's Attorney.

Motion to Strike Out Plea.

Filed July 5th, 1915.

Comes now the Plaintiff, Morgan V. Gress in the cause and court above stated and after the filing of a plea by the Defendants
13 P. D. Camp and P. R. Camp to the jurisdiction of this Court in this cause and moves to strike out said plea to the jurisdiction interposed by the said P. D. Camp and P. R. Camp and on the following grounds, that is to say:

A. Because said plea is bad in substance and insufficient in law.

B. Because the facts pleaded in said plea raise no legal, valid or sufficient objection to the jurisdiction of this Court in this cause over the said defendants, P. D. Camp and P. R. Camp.

C. Because it appears from an inspection of said plea and the declaration filed in said cause and the return of the U. S. Marshal upon the summons issued therein and from the acknowledgment of service made by the Defendant, John M. Camp that the jurisdiction of this Court in this cause against the said defendants and each of them was properly acquired and should be maintained.

D. Because said plea to the jurisdiction is not limited by its terms to the question of the jurisdiction of this Court in this cause over the persons of the said P. D. Camp and P. R. Camp, but addressed to and chal-enges the jurisdiction of this Court in this cause over all of the defendants as to the entire cause of action of the Plaintiff.

E. Because said plea to the jurisdiction does not negative the fact that the said Defendant, John M. Camp, being one of the several defendants in said suit, was found within the Eastern District of Virginia when said suit was filed or when summons issued therein with a copy of declaration attached was served or when the said Defendant, John M. Camp acknowledged service thereon.

F. Because it appears from an inspection of the summons issued and the return of the Marshal and the acknowledgment of service thereon, and now file in this Court, that the Defendant, John M. Camp, on the 26th day of April, acknowledged service, presumably, within the said Eastern District of Virginia of a copy of the
14 same summons issued herein with copy of declaration attached and the said John M. Camp being one of several defendants in this suit at law and being found within the said Eastern District of Virginia, the said plea to the jurisdiction and in abatement of this cause of action should be quashed, stri-ken and denied.

Upon the foregoing motion to strike out said plea the Plaintiff prays the judgment of this Court and that this cause may thereupon proceed in due course.

W. M. TOOMER,
Plaintiff's Attorney.

Order Rejecting Defendants' Plea.

Entered and Filed Jany. 20, 1916.

The motion of the plaintiff to strike the jurisdiction- plea in abatement of the defendant, John M. Camp, in the cause above stated having come on to be heard and having been heard by the Court, upon argument, oral and by brief, and it appearing that the defendant, John M. Camp, by his attorney, J. C. Parker, accepted service herein and it having been determined that said jurisdictional plea in abatement is insufficient in law and should be rejected and stri-ken.

It is thereupon ordered, considered and adjudged by the Court that the said plea in abatement of the said John M. Camp, one of the defendants herein, be and the same is rejected and stri-ken.

And it is further ordered thereupon that in due course under the practice prevailing in this court, and as the said John M. Camp may be advised, he demur, plead or answer further in the cause.

To which action of the Court the defendants, by counsel, duly excepted, which exception is noted and the defendants are given Thirty days to filed proper bills of exceptions.

In open Court at Norfolk, Virginia, on this the 20th day of January, 1916.

EDMUND WADDILL, JR., *Judge.*

Norfolk, Va., Jany. 20, 1916.

15 *Order Rejecting Defendants' Pleas.*

Entered and Filed January 20th, 1916.

The motion of the plaintiff to strike the jurisdiction- plea in abatement of the defendants, P. D. Camp and P. R. Camp in the cause above stated having come on to be heard and having been heard by the Court, upon argument, oral and by brief, and it having been determined that said jurisdictional plea in abatement is insufficient in law and should be rejected and stri-ken:

It is thereupon ordered, considered and adjudged by the Court that the said plea in abatement of the said P. D. Camp and P. R. Camp, two of the defendants herein, be and the same is rejected and stri-ken.

It is further ordered thereupon that in due course under the practice prevailing in this court and as the defendants, P. D. Camp and P. R. Camp may be advised, they demur, plead or answer further in the cause.

To which action of the Court the defendants, by counsel, duly excepted, which exception is noted and the defendants are given thirty days to file proper bill of exceptions.

In open Court at Norfolk, Virginia, on the 20th day of January, 1916.

EDMUND WADDILL, JR., *Judge.*

Norfolk, Va., January 20th, 1916.

Bill of Exception (1).

Filed February 17, 1916.

Be it remembered that at the second of May Rules, 1915, the defendants, P. D. Camp and P. R. Camp, filed their plea to the jurisdiction of this Court, which said plea is in the words and figures following, to-wit:

Plea to Jurisdiction.

P. D. Camp and P. R. Camp, two of the above named defendants, appearing specially under protest for the purpose of this plea and for no other purpose, come and say that this Court ought not to have or take any further cognizance of the action aforesaid of the
16 plaintiff because John M. Camp, one of the above defendants is not a citizen, resident or inhabitant of the Eastern District of Virginia, nor was he such at the time of the institution of the above entitled cause; and that he does not reside therein, but that he is a citizen, resident and inhabitant of the Eastern District of North Carolina, and was such at the time of the institution of the above entitled action, and for a long time prior thereto, and that the said John M. Camp has not consented to being sued in the Eastern District of Virginia, but has declined to submit to the jurisdiction of this court, and further say that as appears by the declaration filed in the above entitled action, the plaintiff, Morgan V. Gress, is not a citizen, resident or inhabitant of the said Eastern District of Virginia, nor was he such at the time of the institution of the above entitled cause, nor does he reside therein, but that he, the said plaintiff, is a citizen, resident and inhabitant of the State of Florida, and was such at the time of the institution of the above entitled cause, and for a long time prior thereto.

And these defendants say that the alleged cause of action set out in the declaration of the plaintiff is a joint and inseparable cause of action against these defendants and the said John M. Camp, and based on a joint contract as set out in the declaration, and that no action can be based thereon against these defendants, unless the said John M. Camp is a party thereto. And these defendants respectfully protest that this Court is without jurisdiction to try the said case without having the said John M. Camp properly before the Court. And this, these defendants are ready to verify.

Wherefore, they pray judgment whether this Court can or will take any further cognizance of the action aforesaid.

P. D. CAMP AND
P. R. CAMP,
By COUNSEL.

R. E. L. WATKINS,
PEATROSS & SAVAGE, *p. d.*

STATE OF VIRGINIA,
Isle of Wight County, To wit:

P. D. Camp, being duly sworn according to law, deposes and says that he is one of the defendants in the above entitled action,
17 and that the matters and things stated in the foregoing plea are true to the best of his knowledge and belief, and that the foregoing plea is true in point of fact and is not interposed for delay.

P. D. CAMP.

Subscribed and sworn to before me this 15th day of May, 1915.

[SEAL.] C. M. GARY,
Notary Public.

My Commission expires October 16, 1917.

I hereby certify that the foregoing plea is, in my opinion, well founded in point of law.

T. D. SAVAGE,
Of Counsel for Defendants.

And on the — day of ——, 1915, the plaintiff, Morgan V. Gress, moved the Court to strike out said plea, which said motion and the grounds upon which the same was based are in the words and figures following, to-wit:

Comes now the Plaintiff, Morgan V. Gress, in the cause and Court above stated and after the filing of a Plea by the Defendants, P. D. Camp and P. R. Camp, to the jurisdiction of this Court in this cause and moves to strike out said plea to the jurisdiction interposed by the said P. D. Camp and P. R. Camp and on the following grounds, that is to say:

A. Because said plea is bad in substance and insufficient in law.

B. Because the facts pleaded in said plea raise no legal, valid or sufficient objection to the jurisdiction of this Court in this cause over the said defendants, P. D. Camp and P. R. Camp.

C. Because it appears from an inspection of said plea and the declaration filed in said cause and the return of the U. S. Marshal upon the summons issued therein and from the acknowledge-
18 ment of service made by the Defendant, John M. Camp that the jurisdiction of this Court in this cause against the said defendants and each of them was properly acquired and should be maintained.

D. Because said plea to the jurisdiction is not limited by its terms to the question of the jurisdiction of this Court in this cause over the persons of the said P. D. Camp and P. R. Camp, but addressed to and challenges the jurisdiction of this Court in this cause over all of the defendants as to the entire cause of action of the plaintiff.

E. Because said plea to the jurisdiction does not negative the fact that the said Defendant, John M. Camp, being one of the several defendants in said suit, was found within the Eastern District of

Virginia, when said suit was filed or when summons issued therein with a copy declaration attached was served or when the said Defendant, John M. Camp acknowledged service thereon.

F. Because it appears from an inspection of the summons issued and the return of the Marshal and the acknowledgement of service thereon, and now on file in this Court, that the Defendant, John M. Camp, on the 26th day of April, acknowledged service, presumably, within the said Eastern District of Virginia, of a copy of the same summons issued herein with copy of declaration attached and the said John M. Camp being one of several defendants in this suit at law and being found within the said Eastern District of Virginia, the said plea to the jurisdiction and in abatement of this cause of action should be quashed, stri-ken and denied.

Upon the foregoing motion to strike out said plea the Plaintiff prays the judgment of this Court and that this cause may thereupon proceed in due course.

W. M. TOOMER,
Plaintiff's Attorney.

Which motion being argued on the twentieth day of January, 1916, the Court granted the motion of the Plaintiff to strike out said plea and entered an order which is in the words and figures following, to-wit:

The motion of the Plaintiff to strike the jurisdictional plea
19 in abatement of the defendants, P. D. Camp and P. R. Camp, in the cause above stated having come on to be heard and having been determined that said jurisdiction- plea in abatement is insufficient in law and should be rejected and stri-ken:

It is thereupon order-, considered and adjudged by the Court that the said plea in abatement of the said P. D. Camp and P. R. Camp, two of the defendants herein, be and the same is rejected and stri-ken.

It is further ordered thereupon that in due course under the practice prevailing in this Court and as the defendants, P. D. and P. R. Camp, may be advised, they demur, plead or answer further in the cause.

To which action of the Court the defendants, by counsel, duly excepted, which exception is noted and the defendants are given thirty days to file proper bill of exceptions.

In open Court at Norfolk, Virginia, on this 20th day of January, 1916.

EDMUND WADDILL, JR., *Judge.*

Norfolk, Va., January 20th, 1916.

To which action of the Court in granting said motion and striking out said plea the defendants, P. D. Camp and P. R. Camp, excepted, and tender this their bill of exceptions, which is duly signed, sealed and made a part of this record this 17th day of February, 1916.

EDMUND WADDILL, JR., [SEAL.]
U. S. District Judge.

Bill of Exception No. 2.

Filed February 17, 1916.

Be it remembered that at the Second May Rules, 1915, the defendant, John M. Camp, filed his plea to the jurisdiction of this Court, which said plea is in the words and figures following, to-wit:

Plea to Jurisdiction.

John M. Camp, one of the above named defendants, appearing specially under protest for the purpose of this plea and for no other purpose, comes and says that this court ought not to have or take any further cognizance of the action foresaid of the plaintiff because this defendant says he is not a citizen, resident or inhabitant of the Eastern District of Virginia, nor was he such at the time of the institution of the above entitled cause; and that he does not reside therein; but that he is a citizen, resident and inhabitant of the Eastern District of North Carolina, and was such at the time of the institution of the above entitled action, and for a long time prior thereto; and further says that as appears by the declaration filed in the said above entitled cause, the said plaintiff, Morgan V. Gress, is not a citizen, resident or inhabitant of the said Eastern District of Virginia, nor was he such at the time of the institution of the above entitled cause, nor does he reside there, but that he, the said plaintiff, is a citizen, resident and inhabitant of the State of Florida, and was such at the time of the institution of the above entitled cause, and for a long time prior thereto, and this the defendant is ready to verify. And the said John M. Camp respectfully sets up, pleads and relies upon the exemption from suit in any other District than in which he resides, conferred upon him by the statutes and laws of the United States; and he here and now respectfully objects to being sued in the Eastern District of Virginia, and protests that this Court is without jurisdiction and declines to submit to the jurisdiction of this court or consent to the maintenance of this cause.

Wherefore, he prays judgment whether this Court can or will take any further cognizance of the action aforesaid.

JOHN M. CAMP,
By COUNSEL.

R. E. L. WATKINS.
PEATROSS & SAVAGE, *p. d.*

STATE OF NORTH CAROLINA,
Duplin County, To wit:

John M. Camp, being duly sworn according to law, deposes and says, that he is one of the defendants in the above entitled action, and that the matters and things stated in the foregoing plea are true to

the best of his knowledge and belief, and that the foregoing plea i true in point of fact and is not interposed for delay.

J. M. CAMP.

21 Subscribed and sworn to before me this 15th day of May 1915.

[SEAL.] B. F. PEARSALL, JR.,
Notary Public.

My commission expires on the 27th day of Nov., 1916.

I hereby certify that the foregoing plea is in my opinion, well founded in point of law.

T. D. SAVAGE,
Of Counsel for Defendant.

And on the — day of —, 1915, the Plaintiff, Morgan V. Gress, moved the Court to strike out the said plea which said motion and the grounds upon which the same was based are in the words and figures following, to-wit:

Comes now the Plaintiff, Morgan V. Gress, in the cause and Court above stated and after the filing of a plea by the Defendant, John M. Camp, to the jurisdiction of this Court in this cause, *and* moves to strike out said plea to the jurisdiction interposed by the said John M. Camp and on the following grounds, that is to say:

A. Because said plea is bad in substance and insufficient in law.

B. Because the facts plead in said plea raise no legal, valid of sufficient objection to the jurisdiction of this Court in this cause over the said Defendant, John M. Camp.

C. Because it appears from an inspection of said plea and the declaration filed in said cause and the return of the U. S. Marshal upon the summons issued therein, and from the acknowledgment of service made by the said John M. Camp on said summons, that the jurisdiction of this Court in this cause against the said John M. Camp, was properly acquired and should be maintained.

D. Because said plea to the jurisdiction is not limited by its terms to the question of the jurisdiction of this Court in this cause
22 over the person of the said John M. Camp, but is addressed to and chal-enges the jurisdiction of this Court in this cause over all of the defendants and as to the entire cause of action of the plaintiff.

E. Because said plea to the jurisdiction does not negative the fact that the said Defendant, John M. Camp, being one of the several defendants in said suit, was found within the Eastern District of Virginia when said suit was filed, or when summons issued therein with copy declaration attached was served, or when the said Defendant acknowledged service thereon.

F. Because it appears from an inspection of the Summons issued and returned in this cause and now on file in this Court that the Defendant, John M. Camp, on the 26th day of April, 1915, acknowledged service, presumably, within the said Eastern District of

Virginia of a copy of the said summons issued herein with copy of declaration attached and the said John M. Camp being one of several defendants in this suit at law and being found within the said Eastern District of Virginia, the said plea to the jurisdiction and in abatement of this cause of action should be quashed, stri-ken and denied.

Upon the foregoing motion to strike out said plea, the Plaintiff prays the judgment of this Court and that this cause may thereupon proceed in due course.

W. M. TOOMER,
Plaintiff's Attorney.

Which motion being argued on the twentieth day of January, 1916, the Court granted the motion of the Plaintiff to strike out said plea and entered an order which is in the words and figures following, to-wit:

The motion of the Plaintiff to strike the jurisdictional plea in abatement of the defendant, John M. Camp in the cause above stated having come on to be heard and having been heard by the Court, upon argument, oral and by brief, and it appearing that the defendant, John M. Camp, by his attorney, J. C. Parker accepted service herein, and it having been determined that said jurisdiction- plea in abatement is insufficient in law and should be rejected and stri-ken:

It is thereupon ordered, considered and adjudged by the
23 Court that the said plea in abatement of the said John M. Camp, one of the defendants herein, be and the same is rejected and stri-ken.

And it is further ordered thereupon that in due course under the practice prevailing in this Court, and as the said John M. Camp may be advised, he demur, plead or answer further in the cause.

To which action of the Court the defendants, by counsel, duly excepted, which exception is noted and the defendants are given thirty days to file proper bill of exceptions.

In open Court at Norfolk, on this the 20th day of January, 1916.

EDMUND WADDILL, JR., *Judge.*

Norfolk, Virginia, January 20th, 1916.

To which action of this Court in granting said motion and in striking out said plea, the defendant, John M. Camp, excepted, and tenders this his bill of exceptions, which is duly signed, sealed and made a part of the record, this 17th day of February, 1916.

EDMUND WADDILL, JR., [SEAL.]
U. S. District Judge.

Plea of General Issue.

And the said defendants, P. D. Camp, P. R. Camp and John M. Camp, by their attorneys, come and say they did not undertake or promise in manner and form as the said plaintiff hath above com-

plained. And of this the said defendants put themselves upon
Country.

P. D. CAMP,
P. R. CAMP, AND
JOHN M. CAMP,
By T. H. WILLCOX,
PEATROSS & SAVAGE,
Their Attorneys

T. H. WILLCOX,
PEATROSS & SAVAGE, *p. d.*

STATE OF VIRGINIA,
Southampton County, To wit:

P. D. Camp, one of the above named defendants, in
24 above entitled cause, being first duly sworn, upon his oa
says that he is one of the defendants in the above entit
cause, and duly authorized to make this affidavit, and that to
best of his acknowledge and belief, the matters and things in
foregoing plea set forth, are true in point of fact, and that the s
plea is not interposed for the purpose of delay.

P. D. CAMP

Subscribed and sworn to before me this 10th day of March, 19

C. W. GARY,
Notary Public

My commission expires October 16, 1917.

Order on Trial, Empaneling Jury, etc.

Entered November 20th, 1917.

This day came the parties, by their attorneys, and the said
fendants come and say that they did not undertake or promise
the manner and form as the said plaintiff hath in his declarat
complained, and of this they put themselves upon the country, a
the plaintiff likewise, and issue is joined. And from the jurors d
drawn and in attendance upon this term of the Court a panel
eighteen jurors were examined by the Court, found free from le
exceptions and qualified to service according to law. Thereupon
plaintiff and the defendants, respectively, struck from the pa
three of said jurors, to-wit: Robert DeJarnette, W. T. Anders
Charles S. Spottswood, Samuel Hodges, N. B. Groome, and John
Charles, leaving the following twelve against whom, there was
objection, to-wit: Shepperd Royster, Harry W. Chapman, E.
Watkins, Walter Harwood, J. R. Binn, W. L. Bennett, Charles
Borland, S. F. Old, C. T. Stephenson, J. W. Watkins, J. T. She
and Martin J. Ryan, who having been as aforesaid, duly elected a
tried, were sworn well and truly to try the issue joined, and at
conclusion of the evidence for the plaintiff, the defendants mo

the Court to direct a verdict for the defendants, and the same being fully argued, was taken under consideration by the Court,
25 and thereupon the jury was adjourned until to-morrow morning at ten thirty o'clock.

EDMUND WADDILL, JR.,
U. S. Dist. Judge.

Order on Trial.

Entered November 21st, 1916.

This day came again the parties, by their attorneys, and the Court having fully considered the defendants' motion to direct a verdict for the defendants, argued on yesterday, overruled the same, to which ruling the defendants excepted, and the jury having appeared pursuant to adjournment and having further heard the evidence, they were adjourned until to-morrow morning at 10:30 o'clock.

EDMUND WADDILL, JR.,
U. S. District Judge.

Order on Trial.

Entered November 22nd, 1917.

This day came again the parties, by their attorneys, and the jury appeared pursuant to adjournment, and at the conclusion of all evidence the defendants moved the Court to strike out of the record all the evidence in reference to any loss occasioned by depreciation of the mill property; loss of rental of the mill property; or by reason of expenditures made by either the plaintiff or the Morgan Lumber Co., in the upkeep and protection of the mill plant; and also to direct the jury to bring in a verdict for the defendants: 1st, because there has been no damage proved; second, because the plaintiff was not entitled to recover any damages on account of depreciation of the plaintiff's mill, rentals, loss of mill or expense in upkeep of same; and third, because the evidence showed that the Morgan Lumber Co., was the party entitled to recover, if any one, in this action, for any loss by reason of the breach of the contract; the evidence showing that the contract made by the plaintiff acting for and in behalf of the Morgan Lumber Co., the real owner of the property, which motions being fully argued, were overruled, to which rulings the defendants excepted, and the jury having
26 received the charge of the Court, to which the defendants excepted, as well as to the Court's refusal to include in it certain instructions offered by them, and having partly heard the arguments of counsel, they were adjourned until to-morrow morning at ten o'clock.

EDMUND WADDILL, JR.,
U. S. District Judge.

Charge of the Court.

Filed November 22, 1916.

The Court instructs the jury that this action is brought by the plaintiff to recover damages of the defendants for breach of Contract, and that the amount of damages claimed is $157,808.34. The making of the contract is admitted. If the jury believe from the evidence that the Plaintiff, Gress, was willing and able at all times after the making of the contract to perform the same as to the matters and things therein contained, which he contracted to do, and if you further believe from the evidence that the defendants, on or about the day or dates named in the declaration, refused to perform the contract according to its terms, then the defendants are liable to the plaintiff for the breach thereof, and if you find that the plaintiff has sustained damages by reason of said breach, you shall ascertain the same as follows:

You will first determine from the evidence what was the fair market value on August 18, 1913, of the properties proposed to be contributed by the plaintiff, Morgan V. Gress, to Levy County Lumber Company in exchange for his portion of the capital stock provided for in the contract. You will then ascertain from the evidence what was the fair market value of these properties on the date when it is alleged that the contract was breached, and if you find that there was a depreciation in the value of these properties between the dates named, and that the plaintiff, Morgan V. Gress, was the owner of all of the stock of the Morgan Lumber Company, which held the titles of these properties, and that the said Company was at all times willing and ready to carry out the contract as made by said Gress, and convey said properties as contracted for by him, the difference in the amounts thus found will be one of the elements of damages recoverable by the plaintiff.

27 2. You will inquire from the evidence the amount of which on August 18, 1913, the timber and timber interests described in the contract sued on, as being located in Levy County, Florida, and belonging to the defendants was to be conveyed to the proposed corporation. You will then inquire what was the fair market value of the timber and timber interests just referred to on the date of the alleged breach of the contract by the defendants, and if you find that on the date last referred to the timber and timber interests in Levy County, Florida, belonging to the defendants and proposed to be conveyed to the Levy County Lumber Company were worth an amount in excess of the amount at which was to be conveyed, then 5/18 of the difference between said first amount and the value of the said timber rights on the date of the alleged breach is the amount which the plaintiff is entitled to recover of the defendants, less such amount as shall equal 5/18 of the cost of extension for five years' additional time in which to cut the said timber, including interest.

No. 3.

The Court instructs you that one of the material provisions of the contract sued on provided for the organization of a corporation, to be known as Levy County Lumber Company, and the assembling into the ownership of that corporation of the saw mill plant and leasehold interest connected therewith, described in the declaration, and in the proof submitted, and as well as the conveyance to that corporation of the timber and timber interests in Levy County, Florida, described in the contract sued on as having been owned by the defendants. It is insisted by the plaintiff that he was ready and willing and able to perform and to procure performance by the Morgan Lumber Company of the plaintiff's obligations in this respect under the contract, and that the defendants failed and refused to perform this particular provision of the contract. If you find this contention of the plaintiff to be supported by the proof to your satisfaction, and by a preponderance of the evidence, the Court instructs you that this will amount to such a breach of the contract sued on as would entitle the plaintiff to recover damages resulting directly from such failure on the part of the defendants to perform that provision of the contract.

28 The Court further instructs you that there is no controversy between the parties under the evidence as submitted as to just when the Levy County Lumber Company when organized should enter actively into the logging and manufacture of the timber in question.

No. 4.

The Courts instructs you that the plaintiff is not entitled to recover possible profits from the operation of the Levy County Lumber Company, the corporation which was never organized, nor are the defendants permitted to set off against damages otherwise satisfactorily shown to have been sustained by the plaintiff, any speculative or possible losses which might have been suffered by the plaintiff, if said corporation had been organized and operated.

5.

The Court instructs the jury that if you believe from the evidence that the defendants breached the contract sued on and that the plaintiff incurred damage thereby, that you should allow the plaintiff as an element of his damages the expenses, if any, incurred for caring for and maintaining his mill property to December 31st, 1914, less the expenses incurred by defendants for caring for and maintaining their timber property for the same time.

6.

The Court instructs the jury that in order for the plaintiff to recover in this case, he must show, not only that the defendants failed

to carry out their contract, but that such a failure caused the plaintiff damage, and the burden rests upon the plaintiff to show by a preponderance of the evidence and with reasonable certainty, the actual damage he sustained, and if the jury believe from the evidence that the plaintiff has not suffered any damages or loss by the failure of the defendants to carry out the said contract, then they should find for the defendant.

29 *Order on Trial, Verdict, Judgment, etc.*

Entered and Filed November 23rd, 1916.

This day came again the parties, by their attorneys, and the jury appeared pursuant to their adjournment, and having fully heard the arguments of counsel, retired to their room to consult of their verdict and after sometime returned into Court with the following verdict, to-wit: "On the issues joined, we, the jury, find for the plaintiff in the sum of $31,361.10. J. W. Watkins, Foreman."

Thereupon the defendants moved the Court to set aside the verdict and grant them a new trial, assigning the following grounds:

(1st) Because the verdict was contrary to the law and the evidence;

(2nd) Because of the action of the Court in granting certain instructions offered by the plaintiff and in refusing certain instructions asked by the defendants; and

(3rd) Because the verdict is excessive in amount.

And the said motion being fully argued, was overruled by the Court, to which ruling the defendants excepted.

It is therefore considered by the Court that the said Plaintiff, Morgan V. Gress, recover of the said defendants, P. D. Camp, P. R. Camp and John M. Camp, the sum of Thirty-one thousand three hundred and sixty-one 10/100 Dollars ($31,361.10) with interest from this date at the rate of six per centum per annum until paid, and his costs herein expended.

EDMUND WADDILL, JR.,
U. S. District Judge.

Norfolk, Va., Nov. 23rd, 1916.

MEMORANDUM: The defendants having excepted to sundry actions and rulings of the Court, taken during the trial of this case, and to the judgment of the Court, leave is given them to file their bills of exception within thirty days from this date.

E. W., JR.

30 *Order Extending Time to File Bills of Exceptions.*

Entered and Filed December 2d, 1916.

On motion of the defendants, by counsel, the plaintiff, by counsel consenting thereto, it is ordered that the time within which the de-

fendants may file their bills of exception be, and the same is hereby extended for a period of thirty days from the expiration of the time heretofore allowed for filing of the said bills of exception.

EDMUND WADDILL, JR.,
U. S. Dist. Judge.

Norfolk, Va., Dec. 21st, 1916.

Order Extending Time for Filing Bills of Exceptions.

Entered & Filed January 20th, 1917.

On motion of the defendant, by counsel, the plaintiff, by counsel, consenting thereto it is ordered that the time within which the defendants may file their bills of exceptions be, and the same is hereby extended for fifteen days from this date.

EDMUND WADDILL, JR.,
U. S. Judge.

Norfolk, Va., January 20th, 1917.

Order Extending Time Within Which Bills of Exceptions May Be Filed.

Entered and Filed January 31st, 1917.

By consent of parties the time within which the defendants may file their bills of exceptions is extended until February 28th, 1917.

EDMUND WADDILL, JR.,
United States Judge.

Norfolk, Va., January 31st, 1917.

31 *Defendants' Bill of Exceptions No. 3.*

Filed February 15, 1917.

Be it remembered that upon the trial of this cause the plaintiff, to maintain the issues upon his part, introduced the following evidence:

MORGAN V. GRESS, the plaintiff, being duly sworn, testified that he was a resident of Jacksonville, Florida, engaged in the wholesale lumber business; that in the early part of 1913 he owned a sawmill in Jacksonville known as the Morgan Lumber Company property and fifty thousand acres of timber on the St. Johns River, about twenty miles from Jacksonville, estimated to cut about 80,000,000 feet of timber.

"Q. Mr. Gress, this sawmill plant and timber, you say, was owned by you?

A. By me.

Q. In whose name did it stand?

A. The plant stood in the name of the Morgan Lumber Company, and the timber in my own name.

Q. So far as the plant was concerned, what was the Morgan Lumber Company?
A. It was a corporation organized under the laws of Florida.
Q. How much stock did you own?
A. I ow-ed it all.
Q. Who was president?
A. I am and was at that time."

Counsel for the defendant objected to any further testimony as to the sawmill property until the witness has produced a deed showing the acquisition of the property prior to the institution of this suit, and also objected to the introduction of any testimony of the depreciation of the sawmill plant property until the plaintiff shall have introduced evidence showing that at the time of the breach and at the time of the institution of the suit he owned the property in question. The Court, however, allowed the question and answer to stand pending further evidence and subject to the objection and exception.

NOTE.—It was here understood between counsel and the Court that the same objection recited above was to be considered as made to all testimony of the witness relating to the same subject matter without being specifically repeated.

32 Witness Resumes: Asked what negotiations and conferences were had between himself and the defendants with respect to the organization of the company described in the declaration as the Levy County Lumber Company and the conveyances to that company of certain timber interests owned by the defendants and certain sawmill interests owned or controlled by him, and what induced those conferences and what the conferences were leading up to the contract, witness replied "I owned the mill and the defendants owned timber, and the story is told in the contract."

Contract referred to, introduced in evidence for copy of same see declaration.

Asked who opened the negotiations, he replied that he did, in the form of a letter to Mr. Camp, one of the defendants; that he subsequently met Mr. Camp, and had several conferences with him prior to the making of the contract of August 18, 1913, and as the result of those negotiations Mr. P. D. Camp came to the mill and went over it once, or perhaps twice, and then Mr. Camp's brother, Dr. B. F. Camp, went over it twice; the superintendent of Mr. Camp's mill, a man named Williams, examined the mill and went over it, and other people connected with Mr. Camp made investigation when witness was not on hand. That the mill plant was completed in 1910, at a cost of $165,000.00. That the witness went to Franklin, Virginia, in June or July, 1913, and had a conference with Mr. Camp, and that Mr. Camp said that if the witness, after examination, found that the timber on the tract owned by the Camps contained 140,000,000 feet that he would form a corporation and put the timber in for $325,000.00; that he (witness) went back to Florida and sent Mr. T. M.

Green and other people, who had been connected with him in the timber business, over the timber, to go over the Camp timber. That Mr. Green was on the tract about two weeks and reported to him that there was 126,000,000 feet of green sawmill timber on the tract, and did not estimate the cypress. That the contract was entered into at Franklin, Virginia, and was drawn by Mr. Camp's lawyer, Mr. Parker. That the witness had no attorney present, and was not represented by counsel, and that the contract then made is the contract introduced in evidence and set out in the declaration.

33 That the contract, with respect to the organization of the Levy County Lumber Company, was not performed because Mr. Camp declined to perform it. That Mr. Camp communicated with witness in respect to the matter, and witness offered in evidence a certain letter dated December 26, 1913, addressed to him, and his reply of the 29th of December, 1913 referring to the contract of August 18, 1913. These letters are as follows:

"Franklin, Va., Dec. 26, 1913.

Mr. Morgan V. Gress, Jacksonville, Fla.

DEAR SIR: What will you charge me to release me of the contract to rent you mill and cancel the contract that is now in force.

Yours truly,
(Signed) P. D. CAMP."

"Jacksonville, Fla., 12-29-'13.

Mr. P. D. Camp, Franklin, Va.

DEAR SIR: Your valued favor of the 26th, asking me what price I would charge to cancel the contract now existing between us. Frankly, I would not care to name a figure, for the reason that I think that the new Company will make an enormous amount of money. The lumber business is going to revive some time, and when it does this mill should make $100,000.00 net profit over and above the stumpage the first year. I note that the Coast Line Road has just agreed to all of the points that seemed to be worrying you when you were down here, and I certainly hope that you will sign this contract at once so that we can get ready for the operation.

I sincerely trust that you will go ahead with the operation, and I will be glad to co-operate with you in any way that I can,

Very truly yours,
(Signed) M. V. GRESS."

34 Witness testified that the language in his letter with respect to the signing of a contract at once referred to a contract proposed by the Atlantic Coast Line Railroad Company; that the timber in question was on the Atlantic Coast Line Railway about 120 miles from Jacksonville. That at the time of the letter the Levy County Lumber Company had not been organized, but that he was assuming that the contract would be executed and was getting

ready for the operation, and the properties would be conveyed to the corporation. He introduced a letter from P. D. Camp dated December 5, 1914, which is as follows:

"Franklin, Va., December 5, 1914.

Mr. Morgan V. Gress, Jacksonville, Florida.

DEAR SIR: I wish to address you frankly, as we have always done each other, in connection with the proposed Levy County Lumber Company.

This matter has been of the deepest interest to me since the beginning of our negotiations. In the outset there was every indication of a profitable enterprise, and I was encouraged to believe that we had splendid prospects. In a comparative short time after the formulation of our plans as to the contract between us, the market began to weaken with no indication of revival. I have studied with care the conditions that confronted us and have exercised the greatest wisdom, which my limited experience would admit, to avoid a great loss. The staying of activities has proven clearly that my judgment was not at fault. No one could foresee the conditions which have arisen, and I am persuaded that every good reason exists at this time why we should not engage in the manufacture of the proposed tract of timber. The prevailing prices would assure a considerable loss, and it is clear to me that we have saved, through my judgment, a loss of from $50,000.00 to $100,000.00 by not operating.

It was also understood that the plant was to be operated under my management. Since the extension of the contract, my three brothers have all failed in health, and I consider them all seriously sick, hence the greater responsibilities of this plant falls upon me and it is simply impossible for me to consider the management of any new business of any character.

35 The good faith which we have exercised mutually, should now be suspended by the best judgment, and we should, as we have heretofore done, consider our mutual interest. Considering along with this, our expenses in the course of the whole matter, these, I think, ought to be cancelled; you assume whatever expense you have had and I assume the expense I have had.

There is no future to the lumber market, as I see it, and to keep these properties tied up may work a great loss to both of us.

I regret exceedingly that these unfortunate conditions have arisen, but we had no power to avert them. The fact remains that we are here, and that we must meet the conditions sensibly.

I propose, therefore, that our contract be cancelled for the following reasons:

First. Because the condition of the market is such that the timber and lumber can not be profitably handled.

Second. Because to undertake to manufacture the proposed tract of timber a considerable loss would accrue.

Third. Because the condition of my brothers' health is such that it would be impossible for me to give the matter my personal management.

Fourth. Because it is mutually destructive to keep the properties of the parties bound in contract when the chances of profitable operation are so remote.

Fifth. Because the best judgment dictates this course.

I propose to cancel said contract between yourself, P. D. Camp, Jno. M. Camp and P. R. Camp, upon the following conditions:

That each party assume his own expense to date.

I believe that my proposal will meet with your approval as I feel that you must have weighed this matter and reached a conclusion similar to the views herein expressed.

Yours very truly,

(Signed) P. D. CAMP."

He also introduced a letter dated December 12th, 1914, from himself to Camp, which is as foliows:

"Jacksonville, Fla., 12-12-'14.

36

Mr. P. D. Camp, Franklin, Va.

DEAR SIR: Your valued favor of the 5th. I regret exceedingly that any discussion should come up at this time concerning the value, to either of us, of the contract we entered into on August 18th, 1913.

Your judgment about starting the operation of the Levy County Lumber Company has proven very correct. Had the operation been started and continued under the very best management in the world, it would have been very difficult to have avoided a loss.

After very carefully reading your letter, I can not see where conditions effecting this property have materially changed, excepted as regards your brothers' health. When we entered into this contract in August, 1915, the lumber market did not justify the operation of the plant, but we both hoped for better conditions in the future; and, I have a great deal more faith in the future of Long Leaf today, than I had in August, 1913,—in that I believe greater returns will come to the manufacturer than were apparent in 1913. With this, you seem to agree.

Regarding the future as I do, in this light, I could not consider cancelling our contract. When you entered into this contract I owned the timber rights on nearly 50,000 acres of timber on the East Coast Canal, lying between Jacksonville and St. Augustine, Fla., which was purchased for the Morgan Lumber Company mill. I sold you the mill because I wanted to be relieved of the personal cares and responsibilities of operating that timber; and, after selling you the mill I contracted with various mills to saw the timber I own on the East Coast Canal. If, therefore, I had this mill on my hands today with no timber back of it, I would be in a very poor position indeed; as you know the relative values of a mill with and without timber.

Considering carefully both of our positions, and with regard to the ultimate gain to all concerned, it appears best to me to put the contract into effect at once.

Very truly yours,

(Signed) MORGAN V. GRESS."

37 That later he went to Franklin, on December 31, 1914 for the purpose of asking Mr. Camp to put the contract in force and form the Levy County Lumber Company and put the properties together, and let them remain as they were for the purpose of selling them as a whole, or to wait until it would be profitable to operate under the contract. That he saw Mr. P. D. Camp, who said that the condition of his brothers' health was such that his entire time would be required to operate their present properties; that this was the only reason he gave why he did not propose to carry out the contract. That the witness urged and pleaded with him not to take that position, but that the last thing Mr. Camp said was that he was not going to carry out the contract, and that the witness left and returned to Jacksonville. That he never had carried out the contract and did nothing in that regard at all. That Mr. Camp gave him the estimate of Brayton & Company, timber estimators, showing that there were 142,000,000 feet of timber on the tract in question. That the witness was an experienced lumber man, and that he regarded $325,000.00 as a fair value of the timber when the contract was made. That stumpage of pine timber in Florida is enhancing in value all the time because it is being rapidly cut out, and that in the opinion of the witness, each year shows an increase in value of stumpage; that he sold 100,000,000 feet of timber situated about 40 or 50 miles south of the tract in question at a price equivalent to about $3.40 per thousand feet, and that the timber sold by him was inferior to the timber in question both in grade and in quantity; that he believed the timber in question was worth $3.50 per thousand feet stumpage on December 31, 1914, at the date of the breach of the contract. That the timber consisted of pine and cypress on 42,000 acres; that, so far as he knew, there were no other tracts of timber of that magnitude and quality accessible to any mill in Jacksonville at that time. That, at the time of the making of the contract, the Camps had five years in which to cut the timber and that it would have taken approximately three and a half years for the mill in question to have cut the timber by running day and night. That the timber in question had been turpentined and that this fact and the short time was an urgent reason for cutting the timber immediately; that the timber ought to have been and could have been cut within the five year period. That

38 the witness thought both properties were materially enhanced in value when they were joined together in one operation that the joining together would add to the value of both, and would add to the value of the timber particularly as it would take a year to build such a mill to cut the timber out. That the mill cost two or three years before the contract was made $165,000.00 and was put into the combination at $125,000.00, and was fairly worth that amount at that time. That after the making of the contract and until the breach of the same the mill was not operated. That insurance was carried on it, and watchmen were employed night and day, and some repairs were commenced in September, 1913, but not completed; that the mill was not operated again until January, 1916, and then under the Rentz contract

that it is now operated under lease to George Rentz from the Morgan Lumber Company. That in the opinion of the witness the value of the mill plant, disconnected from the standing timber, as of the date of the breach of the contract, was the value of the machinery for scrap approximately $25,000.00. That, at the time he was negotiating with the Camps, he carried from $137,000.00 to $139,000.00 of insurance on the plant, and after the breach of the contract he carried $71,000.00. That the sawmill in question was burned in March, 1916, and that approximately $10,000.00 had been spent on it before Rentz took charge, and after the *first* it was rebuilt to the extent of the insurance money collected, as he was required by his contract to do. That the witness was at all times able and willing to carry out his part of *of* the plan of the organization of the Levy County Lumber Company, and that there was no condition existing, so far as he was concerned, to retard the performance of the contract; that he was in position to require the Morgan Lumber Company to make the conveyance direct to the Levy County Lumber Company, and had been authorized by it to do so, and offered in evidence a copy of the minutes of the Morgan Lumber Company under date of January 6, 1914, which is as follows:

"Minutes of Meeting of Directors of Morgan Lumber Company, held at Room #716, Atlantic National Bank Building, Jacksonville, Fla., on January 6th, 1914.

Present, M. V. Gress, C. D. Fish, F. A. Morgan and A. H. Stephens.

39 The minutes of the preceeding meeting of the Directors were read and approved.

A contract entered into between M. V. Gress, representing the Morgan Lumber Company, and P. D. Camp, representing the Camp Manufacturing Company, of Franklin, Va., dated August 18th, 1913, whereby M. V. Gress agrees, for the Morgan Lumber Company, to the formation of a new Corporation, to be known as the Levy County Lumber Company, Capital $9,000.00; of which M. V. Gress, representing the Morgan Lumber Company, receives $2,500.00 stock valued at $125,000.00 for the Morgan Lumber Company saw mill plant, located near Ortega; and P. D. Camp, representing the Camp Mfg. Company, receives $6,500.00 of the stock of the Levy County Lumber Company for timber holdings of the Camp Mfg. Company in Levy County, Florida; estimated amount of timber on land 140,000,000 ft.

Furthermore, the Levy County Lumber Company is to pay to M. V. Gress, for Morgan Lumber Company, a rental of $375.00 per month for the use of the land on which the mill is located, so long as needed for that purpose, etc.

Now, Then, Be it Resolved, that the Directors of the Morgan Lumber Company, do hereby approve the said contract in its entirety.

Certified Copy.
(Signed) C. D. FISH, *Secretary.*"

The witness testified that the contract mentioned in the mint was the contract sued on; that he, the witness, had disbursed $ 755.61 on account of carrying the mill plant from August 18, 19 to the time of the breach. That amount included unpaid rent $375.00 a month for 15 months.

Here witness was asked:

"Q. My associate has suggested to me that perhaps the jury do understand the difference in the status in the land and the m Who owned the land?

A. The Morgan Lumber Company owned the land and the mi

Q. There was to be a rental of $375.00 paid by the Levy Cou Lumber Company for the land and an option to purchase land $75,000.00?

A. That is correct."

Continuing the witness said that he went to Franklin up receipt of a letter from Mr. Camp saying he did not expect carry out the contract which had been made, and asked him to the contract into effect, and either hold the properties, the mill a lumber, as one proposition to be sold together, or to put it into eff as an operating concern when the time should be propitious. Th in his opinion, the timber was worth $3.50 per thousand feet at time contract was broken, which would make it worth $490,000. and the plant was worth $125,000.00 if connected up with the timb That when Mr. Camp declined to carry the contract out and form new corporation the mill property was worth only the price of machinery for junk, about $25,000.00. That the purpose in placi the capital stock of the Levy County Lumber Company at $9,000 was to save charter fees and expenses of organization, but that, proportion which each should receive for his properties put into company was maintained—that is Gress was to receive 5/8th- of capital stock and Camp was to receive 13/18ths of the capital stoc

Witness testified that quite a revival in the lumber business h pened in the summer following the breach of the contract; that August, 1915, lumber started going up and went up very rapidly the part of the country in which the tract of timber in question v located; that from August, 1915, to December, 1915, it went up proximately $4.00 or $5.00 a thousand feet on manufactured lumb that during the period 1913, 1914 and 1915 fluctuation in the mar price of lumber did not affect the stumpage, that it went up all time moderately; that if the contract had been carried out they cou at this time, operate under it very profitably.

On cross examination witness was handed a contract made betwe Morgan Lumber Company and George Rentz, and identified it as of two originals executed at the same time, and testified that contract was signed "Morgan Lumber Company, by M. V. Gr President," and attested by C. D. Fish, Secretary, with the corpor seal of the company affixed; that the contract was dated Decem 10, 1915, and that at the date of the contract the mill plant in qu tion was owned by Morgan Lumber Company. The contract v offered in evidence, and is as follows:

41 "STATE OF FLORIDA,
County of Duval:

Contract Entered into this 10th Day of December, A. D. 1915.

The parties to this contract are Morgan Lumber Company, a corporation under the laws of Florida, with its executive office in Jacksonville, Florida, as party of the first part, and George Rentz of the County of Marion, State of Florida, party of the second part.

The Considerations moving interchangeable between the parties to support this contract are:

(*a*) The covenants and agreements made on the part of Morgan Lumber Company and to be by it kept and performed; the use of the property, hereinafter described, for the purposes stated.

(*b*) The moneys to be paid by George Rentz to Morgan Lumber Company and the mutual covenants and premises hereinafter made and stated.

The subject matter of this agreement is as follows:

Morgan Lumber Company, the owner of the premises and the saw mill plant hereinafter described, lets and leases unto George Rentz that certain saw mill plant owned by it on McGrits' Creek and Atlantic Coast Line Railroad in Duval County, Florida, described, generally, as a circular and band mill with planing mill and dry kiln belonging thereto and all and singular the machinery and saw mill equipment, mill-house, structures, skids, platforms, docks, out-houses, tenant-houses, sidings, privileges and property in and upon the following described lands in Duval County, Florida, to-wit:

Those certain lands described and conveyed in a deed from Hillman-Sutherland Company to Morgan V. Gress dated June 10th, 1909, and recorded June 10th, 1909, in the Public Records of Duval County, Florida, in Deed Book 56 at page 84, except approximately ten (10) acres heretofore sold and conveyed by Morgan V. Gress.

And excepting, however, approximately ten acres of said premises adjoining and on the east side of Atlantic Coast Line Railroad Company's right of way, bounded and designated by iron stakes and
42 which ten acres approximately are reserved by party of the first part.

It is contracted and agreed that the said George Rentz shall take possession of the property hereby leased on fifteen days' notice to Morgan Lumber Company at any time between February 1st and April 1st, 1916.

An accurate inventory will be now made of all tools and implements on and connected with said plant and the valuations thereof be made thereon by the parties and at the conclusion of the lease by lapse or expiration under its terms, said tools and implements will be delivered by George Rentz to Morgan Lumber Company in kind and quality similar to those received or in lieu thereof, the present appraised value of said tools respectively will be paid by George Rentz to Morgan Lumber Company.

The said sawmill plant and its equipment is to be delivered now

and received in its present condition, except that Morgan Lum
Company, at its separate expense, shall furnish and install a new
haulup chain with necessary dogs and a new shotgun feed for
long side of the mill. All locomotives and old machinery, not
required or used in connection with the said sawmill plant, but u
the premises in question are excluded from the terms of this lease.

The said George Rentz agrees to manufacture in said plant not
than seventy-five million feet of lumber and to cut the same a
minimum of twelve million feet per year and to pay therefo
Morgan Lumber Company one ($1.00) dollar per thousand
board measure. In the event of the manufacture by George Re
of any shingles or laths, they shall be paid for at the rate of
cents (10c.) per thousand, laths or shingles.

It is further contracted and agreed that George Rentz shall furn
Morgan Lumber Company on or before the 10th day of each calen
month a written report of the cut of said mill plant and also of
shipments of manufactured lumber including shingles and la
made from said plant during the previous calendar month, and
or before said 10th day of each month shall make payment to Mor
Lumber Company, at the rates above named, covering the cut of
mill during the previous calendar month.

If in any calendar month during the life of this cont
43 the said George Rentz shall fail to cut the minimum of
million feet per month hereinabove stated or a proportion
that minimum, in that event, on or before the 10th day of the foll
ing month the said George Rentz shall pay Morgan Lumber Compa
at the rate of one ($1.00) dollar per thousand feet for the minim
cut provided by the contract to be manufactured; but in the event
payments are thus made on account of lumber not actually cut, s
payments will be credited to George Rentz against the first excess
the minimum cut by him in any succeeding calendar months.

It is further contracted and agreed between the parties that at
option, and separate expense, Morgan Lumber Company will h
the right to employ and place at said plant an agent who will be
corded access to the books and records of the said George Rentz
so far as they disclose the cut of the mill and the record of the sh
ments of manufactured lumber therefrom.

It is understood and agreed that all steel rail now on the prem
hereinabove described is the property of Atlantic Coast Line Railr
Company and that any rentals accruing or due thereon shall be p
by Morgan Lumber Company.

The said sawmill plant, mill, planing mills, dry kilns, docks
appurtenant buildings are to be insured by and in the name
Morgan Lumber Company in the sum of one hundred thous
($100,000.00) dollars and the premiums thereon shall be char
against and paid by George Rentz, not exceeding $2,510.00
annum, provided the present standard of fire risk and protectio
maintained at said plant and the said plant is not operated at nig

In the event of the partial or total destruction by fire of said s
mill plant within two years from this date, such part of said plan
shall have been destroyed, or the entire plant, if totally destroy

shall be rebuilt and restored by Morgan Lumber Company at its expense within four months after the fire loss occurs. In such event the monthly payments of rental herein provided for shall abate during said four months and the life of this contract shall stand extended for the number of months required for the replacing or reconstruction of the plant. If the said plant shall be destroyed by fire at any time after two years from the date of the contract, the cutting
44 contract shall be thereby terminated and after the payment of all accrued rentals to that date the parties hereto shall settle out this contract on the following basis:

The insurance of one hundred thousand ($100,000.00) dollars hereinabove provided to be carried in the name of Morgan Lumber Company and paid for by George Rentz shall be collected by Morgan Lumber Company and in an account stated between the parties George Rent shall be charged with one hundred thousand ($100,000.00) dollars and six per cent interest thereon from the date of this contract and credited all rentals previously paid and six per cent interest thereon from the date of the respective payments and the balance thus ascertained shall be retained by Morgan Lumber Company from the insurance fund aforesaid and the remainder of said one hundred thousand ($100,000.00) dollars paid to George Rentz.

It is further stipulated and agreed between the parties that in the event of the total destruction of said sawmill plant on any day more than two years after the date of this contract that the said George Rentz shall have the privilege at his separate expense of rebuilding said mill plant and occupying the premises herein leased for a term not to exceed seven years next ensuing after the said total destruction of said mill plant; the said George Rentz in that event to pay annually to the said Morgan Lumber Company as rental for the use of the premises in question an amount which shall represent six per cent interest on the fair then market value of the premises in question, and it being expressly further provided that in the event of the reconstruction of said mill by the said George Rentz at his separate expense, then at the expiration of the term herein just above provided for, the said George Rentz shall have the right within reasonable time to remove from said premises all mill buildings, dry kilns, planing mills and other buildings and as well all machinery and equipment by him constructed or installed.

If after two years from the date of this contract said mill plant shall be partially destroyed by fire it shall be replaced by Morgan Lumber Company within four months from the date of such partial loss. If such partial loss shall necessitate a suspension of operations at said plant, then the term of this contract shall be thereby
45 extended the number of months devoted to reconstruction or replacing of the partial loss and the rentals payable during that period shall abate.

The said sawmill plant including mill plant, planing mill, dry kilns, docks and outbuildings are to be delivered and received in their present condition except as hereinabove provided with respect to log

haulup chain and shot-gun feet, and said plant is to be maintained and kept and at the expiration of this lease returned to Morgan Lumber Company in its present condition, reasonable wear and tear alone excepted.

It is expressly covenanted and agreed between the parties that all improvements and additions made by the said George Rentz in the nature of buildings, platforms, docks or equipment or machinery installed or used in connection with said plant shall become immediately a part of said plant and at the termination of this lease belong to Morgan Lumber Company.

In the event of a failure on the part of the said George Rentz to pay the rentals herein stipulated to be paid at any time within ten days after the dates fixed for the payments of said rentals, such failure or failures shall be deemed, at the option of Morgan Lumber Company, breaches of the contract in its entirety.

It is expressly further contracted and agreed between the parties in so far as the said George Rentz is concerned this contract is personal and that except on the written assent of Morgan Lumber Company it may not be sold or assigned to or acquired by any other person whomsoever.

This contract, unless otherwise terminated by lapse, or total destruction of the plant by fire as hereinabove stated or extended for periods representing the time devoted to reconstruction of the partial or total destruction, shall expire six years and three months after this date, unless in the meantime George Rentz shall have completed the manufacture of the seventy-five million feet herein provided to be cut; in which last event said contract shall expire when said seventy-five million feet shall have been cut.

46 It is further stipulated and agreed, however between the parties that if at the expiration of the term of six years and three months herein fixed, or if prior to that date, the said George Rentz shall have manufactured at said mill plant the total of seventy-five million feet herein fixed and it shall then appear that George Rentz owns or controls additional stumpage available for manufacture at said mill plant, then, at the option of the said George Rentz, this contract may be extended according to its terms from year to year and for not exceeding five years, it being provided, however, that in the event the said contract is to be thus extended the said Morgan Lumber Company shall have six months' written notice from George Rentz of his desire and purpose to obtain said extension.

In witness whereof the parties hereto have executed this contract in duplicate and delivered each to the other interchangeable a copy of the same; the said Morgan Lumber Company signing in its corporate name by its duly authorized President and Secretary respectively and under the seal of the corporation, and the said George

Rentz signing under his hand and seal, all the day and year first above written.

MORGAN LUMBER COMPANY,
By M. V. GRESS, *President.* [SEAL.]

Attest:
C. D. FISH, *Secretary.*

GEORGE RENTZ. [L. S.]

Signed, sealed and delivered in our presence:
J. S. LOVELACE.
J. E. ROBERTSON.

STATE OF FLORIDA,
County of Duval:

In person before me, a Notary Public in and for the State of Florida at large, appeared George Rentz, known to me per-
47 sonally and who acknowledged before me that he executed in duplicate the foregoing contract for all and singular the purposes therein expressed.

Given under my hand and seal this 10th day of December, A. D. 1915.

(Signed) J. E. ROBERTSON,
Notary Public, State of Florida at Large.

My Commission expires May 22, 1919.

STATE OF FLORIDA,
County of Duval:

In person before me, a Notary Public in and for the State of Florida at large, duly commissioned and authorized to take acknowledgments of deeds and contracts affecting the lease or sale of lands, appeared Morgan V. Gress and C. D. Fish, each of whom are known to me personally and known to be the President and Secretary respectively of Morgan Lumber Company and each of whom acknowledged that for and on behalf of Morgan Lumber Company, in its corporate name, they executed in duplicate in their official respective capacities the foregoing contract for all and singular the purposes therein expressed, and by similar authority they caused the seal of the corporation to be affixed thereto.

Given under my hand and seal this 10th day of December, A. D. 1915.

(Signed) J. E. ROBERTSON,
Notary Public, State of Florida at Large.

My Commission expires May 22, 1919.

Continuing witness testified that not all of the mill plant was included in the Rentz contract, there being excepted therefrom about

ten acres which was used by the Gress Manufacturing Company for storing pine and cypress cross-ties; that the value of the ten acres which was excepted from the contract was about $15,000.00, and that the rental value would be $75.00 a month. That, at the time
48 the mill plant was burned, he carried $71,600.00 insurance, and collected from the insurance company $57,000.00; that he did not have the proofs of loss, but that the money was paid to him personally; that the proofs of loss were signed by the Morgan Lumber Company by M. V. Gress, President; that the checks were made the same way to the Morgan Lumber Company. That in making up the proofs of loss he did not put any value on the property destroyed; that the adjusters came there and went through the books and made up the proofs of loss, and he signed it; that he did not place any value on the plant, as he recalls. That the part of the mill plant burned was the whole sawmill and a part of the skid; that the planing mill and dry kiln and 17 or 18 buildings were not burned; that he still owned these buildings; that they are in a bad state of repair, were built in 1910, and that he could not say how much they are worth. "I insured the property for $71,600 (that is the saw mill, dry kiln, planing mill and other property not burned), and guaranteed in the policy that it was 90 per cent of the value; that there are 40 houses or shanties, including the negro shanties; that while he had $71,300 insurance, he had ordered it to be increased to $84,600 as the various policies expired, because he and Mr. Rentz had spent that much money in getting the plant ready to operate. The companies settled on the basis of $84,600, the balance on the basis of $71,300.00; that he got exactly $57,873.00; that the contract with Rentz required him to carry $100 000.00.

Continuing he said that the mill property (that is the dry kiln and planing mill) were worth $15,000.00; that he could give no idea of the value of the 40 houses; approximately $100.00 a piece—$4,000.00 for the 40; that they rented for about $150.00 a month, possibly $200.00, when the plant was in operation. He could not state the gross rental. They did not rent for anything for two and and a half years. The plant was idle in 1915, and we had difficulty in maintaining insurance. A part of it was operated as a planing mill to keep the insurance in force. A car or two of lumber may have been shipped from the railroad to the boat over the dock. Sometimes the lumber was received on lighters and unloaded; that he received no revenue from the property, and lost considerable money.

That when he entered into the contract he understood that the timber controlled by the Camps and to be put into the new
49 corporation was held under timber leases which had about five years to run. That he had considerable correspondence with Mr. Camp as to securing an extension of the time in which to cut the timber. That he objected to paying out any money to have the time extended because it was unnecessary with a mill which could cut it well within five years.

Four letters were offered to the witness, dated respectively October 9th, November 10th, 13th, 17th, 1913, from the witness to

P. D. Camp, identified and offered in evidence, which are as follows:

"10–9–13.

Mr. P. D. Camp, Franklin, Va.

DEAR MR. CAMP: Your two valued favors of the 4th. Am pleased to note that you regard it as a good thing to start the Cross Tie Operation at an early date. Cross ties are very much in demand at the present time, both Cypress and Pine, and there is a tremendous lot of that timber most suitable for cross ties.

In this connection will say that we have several mule teams which we are going to dispose of this month, and if The Levy County Lumber Company will want some teams, naturally, I would be glad to have them get the first pick of same.

Regarding extension of the timber lease, will say that taking the entire tract of timber at 140,000,000 ft., there are two disconnected tracts, that is tracts scarcely large enough and scarcely accessible enough to the main body of the timber to warrant tramming the same. It would therefore be desirable to sell off these 2 tracts to smaller mills. This would amount to between Five and Ten Million feet of timber. Of course, we could have that cut out in the next three years. The cross tie timber on this tract will amount to 30,000,000 to 40,000,000 ft. This would leave just about 100,000,000 ft. of timber to come to the mill. The mill can very cheaply be made to cut an average of 90,000 ft. per day, or easily 24,000,000 ft. per year, so that the tract could be cut out in four years. In case another depression came, we would have one year's margin. If, however, other accidents should happen, such as destruction of the mill by fire, or a depression greater than one year, we could always cut the timber down, bring it to the mill and store it; that is to say, we could, with very little expense, arrange to store in McGirts Creek any timber which we failed to saw up within the terms of our lease. I would be safe in saying that we could store twenty to twenty-five million feet. Under these conditions it would be a total waste of money to pay anything for the extension of the lease, and for my part I would be opposed to paying one cent. I know Mr. Angus well indeed, personally, he was my successor as the President of the Florida Country Club, and I feel that if an extension of the lease was at all necessary, we could get it three years from now upon a much more favorable basis than we could today, as within three years' time, we will have taken off about three-fourths of the timber, and he would then look upon the extension on the basis of the value of the timber left.

I shall be looking for you on the 15th.

Very truly yours,

(Signed) MORGAN V. GRESS."

"Jacksonville, Fla., 11-10-13.

Mr. P. D. Camp, Franklin, Va.

DEAR SIR: Your favor of the 8th, subject of extension of the timber lease. You know that during the past three or four years I

have closed down our mill twice entirely on account of low prices of lumber, and this was the most expensive mistake I ever made, as there never has been a time, when, if the mill had been fully logged, we could not have gotten a good price for our stumpage, and for eight months in the year a very handsome profit. By starting the mill January 1st there will not be the least trouble in the world sawing up all of the timber there one year earlier than the lease extends to. In addition to the fact that the Morgan Lumber Company can easily be run day and night, and turn out 150,000 ft. per twenty-four hours, will say that there are two other mills in Jacksonville who can be hired to saw these logs at so much per thousand, into orders which you might supply to them. In other
51 words, the logs would come to our mill, be dumped in the water there, and towed about five miles to one of these mills where they could be sawn at so much per thousand, and delivered back on lighters. We are paying $5.50 per thousand now for this service, to include kiln-drying and sorting Boards, but this is on very small logs. Fair average size logs could be done for $4.50 to $5.00.

The situation of bringing the logs to Jacksonville to be manufactured is so totally different from operating in the woods, until it is hard for me to explain how absolutely certain I am that to pay $1.00 for this extension is just that much money wasted. If I could get the extension of this lease for five years for the sum of $5,000.00 instead of for the sum of $25,000.90, I would not consider it a minute. I tell you most positively, that we stand absolutely no chance to lose any of this timber. The lumber market is always good from the 1st of November to the 1st of May and June. It has picked up with us here now anywhere from $1.00 to $2.00 per thousand. Orders are very plentiful, and orders for any sized and grade stock may be obtained, therefore a further advance will certainly occur within the next couple of weeks. The mill is fully equipped with electric lights, and it will take mighty little extra expense to arrange for a night operation on a high market. This mill should arrange 80,000 ft. per day, for 300 days in a year, and 50,000 ft. a night for 150 nights in a year, or a total of 31.-500,000 ft.; but, cut this back a few million feet and consider that there is lots of dead timber in that tract, more suitable for cross ties than for lumber—in other words, there is 20,000,000 ft. of stuff there which should go into cross ties. You will see that this operation can be easily cleaned up in four years, thus giving us at least one year's margin of safety.

Please also bear in mind that we have on our staff as brokers twenty-five sawmills, whose exclusive output we control; and, if at the end of two years from now you saw that our mill was not going to cut all that timber, we could install some of these mills in the outlying and disconnected tracts.

I can not urge too much, that we do not start this operation out with a $25,000.00 unnecessary expenditure.

Very truly yours,

(Signed) MORGAN V. GRESS."

52 "Jacksonville, Fla., 11-13-13.

Mr. P. D. Camp, Franklin, Va.

DEAR SIR: In addition to the many suggestions of what to do to prevent the necessity of making a payment of $25,000.00 for timber extension lease, would say that we would have room at the present mill site to put up a small mill that would cut 15,000 or 20,000 feet of lumber per day, taking logs out of the same mill pond, provided the necessity arose for such a mill. In other words, for one-half of $25,000.00, we could be absolutely assured of sufficient output to cut every bit of that timber within four years actual operating time, allowing one year for poor market.

Very truly yours,
(Signed) M. V. GRESS."

"Jacksonville, Fla., 11-17-13.

Mr. P. D. Camp, Franklin, Va.

DEAR SIR: Regarding your decision for the Crystal River Lumber Company to pay $25,000.00 for the extension of the timber lease for a period of five years, I was wondering if the following proposition would appeal to you: That in consideration of my not being asked to pay any part of that $25,000.00 I should be willing for the Levy County Lumber Company to give you, personally, a deed to all of the timber on that tract under 14" in diameter at the stump 2 ft. from the ground, and further to permit you to use all the railroad, free of cost, which might be projected through that timber for the bringing out of same. Perhaps this is not exactly clear. My idea, however, is, as follows: That if we did not cut this small timber, that we could easily cut all the timber there within three to four years. Secondly, that it is not profitable to log or manufacture small timber in Florida, however profitable it may be in Virginia. For this reason I should be willing that you should have all of this stumpage so far as I am concerned, free of any cost whatever, and have the free use of the railroad which the Levy

53 County Lumber Company will have to build through the timber, for the bringing out of this small timber, with the understanding only that the bringing out of the small timber would in no wise interfere with the bringing out of the other timber by the Levy County Lumber Company. From conversing with Mr. Greene on this subject, I should judge that there was on this tract about 30,000,000 ft. of timber 14" at the stump and smaller. This 30,000,000 ft. of timber I estimate will cost, as follows: Logging $7.00 per thousand, freight to Jacksonville $4.00 per thousand, manufacturing expense $6.00 per thousand, total $17.00 cost. When manufactured it will yield about $14.00 per thousand, so that the net loss in cutting this timber by the Levy County Lumber Company would be $90,000.00.

Judging from your letter of the 14th, you have not very much opinion of my knowledge of saw-milling in Florida, and considering

the fact that I have lost about $100,000.00 in the last three years sawing small logs of this size, I must confess that I thoroughly agree with you. At the some time, I hate to be a party to making exactly the same mistake a second time.

Very truly yours,

(Signed) MORGAN V. GRESS."

That he was opposed to the extension because the timber could have been manufactured within the contract time; that it was his desire and intention to start the manufacture of this timber whenever it became profitable to do so; that it became profitable in August, 1915; that operations should not have been begun in December, 1914, in his opinion; that if operation had begun in January, 1914, under efficient management, and all of the small timber had been milled and operated against his judgment, the plant would have lost money. If small size timber had been left in the woods and timber of the size of 14 inches and greater at the stump had been taken, the mill would have made money all the time it operated, even under depressed conditions. That there was no sale for small timber during that period and that the whole timber could not have been operated at a profit until August, 1915, and that there was 30,000,000 feet of the timber too small to justify cutting; that cutting all the timber except that 30,000,000 feet of small timber, the mill could have been
54 operated profitably all the time; that he opposed cutting the small timber under any conditions. That he had been over the timber; that in his opinion the mill was worth only $25,000.00 the day Mr. Camp declined to carry out the contract, December 31, 1914. This was his opinion when he brought the suit, but that he wished to say that he had changed his opinion; that since he had filed the suit he had been able to make some other disposition, and that he did not mean to say now that it was not worth more than that. "The plant now is worth my lease to Mr. Rentz to pay me $1,000.00 for 7[illegible] months, which, computed at six per cent, would make the value of that lease, provided Mr. Rentz made all the payments and provided he was able to carry out the contract, it would be worth $61,000.00. From that I am to take $375.00 a month rent on the land which Mr. Camp was to pay me, and which I do not get under this Rentz lease. That brings the value of that Rentz contract down to $36,000.00. Then to that may be added whatever the plant may be worth at the end of six years. That will probably be worth $12,000.00 or $15,000.00, so that I would say the plant is worth, in view of later events which I did not know at the time of filing this suit, $50,000.00."

Continuing, that he received $57,000.00 insurance covering damages to date after the breach of the contract; that he was obliged to put the money right back into machinry, lumber and buildings that would deteriorate rapidly; that if he could have cancelled the Rentz contract and have taken the $57,000.00 and put it in his pocket he would have been very happy. That the contract with Rentz required him to replace the mill if burned within two years from the date of that contract. If burned after two years from the date of the con-

tract it was to be handled as stated in the contract. That Rentz was to keep the building in repair. That the plant cost $165,000.00; that it had been burned up, so that is not to be considered. The plant put back there today, at the end of 75 months, would be only worth the machinery, and the machinery cost $30,000.00; that the balance would be labor, concrete foundations, woodwork, placing machinery, millwright work—all expensive work; that $15,000.00, at the end of six months, would be a very fair valuation, even if kept up in accordance with the lease. That the commuted value of the Rentz contract would be $61,000.00; that at the end of the contract it would be worth $61,000.00 plus the value of the mill and less the
55 rent of the land at $375.00 a month for the same length of time. That 40 acres of land were rented. That the statement of carrying charges offered, amounting to $16,000.00, included rent of the land for 15 months at $375.00 a month. There was insurance on the plant for the same length of time, the salary of the care-taker, day and night watchmen, also some repairs authorized by Mr. Camp; that this money was disbursed by the Morgan Lumber Company out of his pocket for account of and charged to the Levy County Lumber Company under an arrangement between him and Mr. Camp to the effect that all money that he paid out he would get credit for when they commenced calling on him for his 5/18ths of the cash necessary to start the plant. That no rent was paid at all; that the insurance was paid by his personal check given to Mr. Stewart, who disbursed it. That no one was interested in the Morgan Lumber Company; that he does not recall whether Mr. Stevens held any stock or not; that if he did, he did not own it.

Continuing, witness was asked:

"Q. Will you state again, please, who holds all the stock of the Morgan Lumber Company today?
A. I own it all.
Q. All the shares of stock stand in your name?
A. I own it all.
Q. Did you own it all at the time this suit was brought?
A. I did."

Continuing, witness said that when he was in Franklin, in December, 1914, he did not have any conversation with Mr. Camp to the effect that the contract should be left in abeyance until lumber was at such a price in Jacksonville as would justify operating the plant; that what he said was that he was perfectly willing for him (Camp) to go ahead and form the Levy Lumber Company, then start sawing lumber or selling the whole thing out, or doing anything he wanted to, just so he carried out that part of the contract agreeing to form the Levy County Lumber Company; that he did not say that it was agreeable to him to leave the contract in abeyance until lumber was selling at $20.00 a thousand f. a. s. Jacksonville; that the correspondence would show everything that he ever did, said or thought; that he was perfectly willing to wait forever, or as long as neces-

56 sary, to start the mill, but that he urged the formation of the Levy County Lumber Company in accordance with the contract; that he always did that; that he was willing not to start operations; that he was willing to defer to the judgment of the man who owned 13/18ths of the corporation.

On redirect examination, witness, continuing, said that the sole object of his visit to Franklin was to insist on the completion of the contract; that he did not insist on the immediate operation of the mill; that they simply had to apply for a charter, have the Morgan Lumber Company transfer the mill to the new company, and have Mr. Camp transfer the timber to the company, and then the corporation would be in charge of the whole property; that he would have five-eighteenths of the stock and Mr. Camp thirteen-eighteenths, and that is what he went there and insisted should be done. That if Mr. Camp was of the opinion that it was not profitable to operate the mill, he was willing for the mill to be sold; that he so wrote to Mr. Camp several times. That as the result of his inspection, the plant and timber, at the time of the breach of the contract, if they had been united as contracted for, was worth $615,000.00—$490,000.00 for the timber and $125,000.00 for the plant. That was on the basis of $3.50 per thousand feet for pine and cypress stumpage. The cypress was worth $5.00 or $6.00 a thousand, but the pine was worth about $3.25, which made $490,000.00 for all. That if the company had been formed he stood ready then and there to convey to it his property, and that of the valuation stated by him he would have been entitled to 5/18ths. That after the contract was broken he considered the value of the mill depreciated. That in several communications to Mr. Camp he suggested a way in which the timber could be cut so as to show a reasonable profit, and at the some time to complete the entire cutting within the contract period, provided the little timber was not cut.

That the depreciation of the sawmill was due to the fact that it had not the timber to cut, and large bodies of timber were not available to be connected up with the sawmill; that the separation of the timber from the mill depreciated the value of the mill. That the value of $125,000.00 he figured was figured as a going concern, and that the lower figure was figured when not a going concern,
57 without timber or timber available as far as he knew, and not to inherent defects in the mill itself.

On re-cross examination, witness, continuing, said that if the contract had been carried out and the mill and timber conveyed to the corporation, the corporate assets would have been $600,000.00. In other words, that if the mill had been conveyed to the new corporation, and the timber conveyed to the new corporation, it would have been worth $615,000.00; that he thought this on December 31, 1914 but that he did not think it in December, 1913; that there was an enhancement in the value of stumpage between December, 1913, and December, 1914; every day there was an enhancement. That although there was one year less in which to cut the timber, it made no difference, that the stumpage went up all the same. That he did

offer to sell his interest in the Levy County Lumber Company for $125,000.00, less ten per cent; that he was willing to sell on the basis of $450,000.00 for the whole property, less ten per cent, in 1913. That he wrote the letter dated January 28, 1914, offered in evidence, which is as follows:

"Jacksonville, Fla., 1, 18, '14.

Mr. P. D. Camp, Franklin, Va.

DEAR SIR: Yours of the 26th. I should be perfectly willing to have you sell the Levy County Lumber Company property, consisting of the mill and timber for $450,000.00, and pay a commission out of this total price, the sale to be made upon basis of $50,000.00 cash, and balance at $3.50 per thousand on the timber as cut, with interest on deferred payments at the rate of 6%. If you will go ahead and enter into the contract with the Railroad Company, get the rail secured and everything in shape for commencing this operation at some definite date in the future, I do not think that there will be any trouble in our finding a good and reputable buyer who will take the property about on this basis; and, if you will authorize me to enter into negotiations along this line, I will take the matter up with Douville direct, inasmuch as I would have to look after the showing of the timber and the mill. Or, it will be entirely agreeable with me for you to conduct the negotiations.

58 Please bear in mind, that while I believe this operation will make a tremendous sum of money, I have no more desire to continue in the sawmill business than you have; and, that if a sale to another party of both of these properties can be effected, you would find me ready and willing to meet your ideas of price and terms.

Very truly yours,

(Signed) M. V. GRESS."

Witness, continuing, stated that in his opinion the standing timber, without an extension of time within which to cut it, was worth more in December, 1914, than in December, 1913.

Stipulation of Counsel: It is stipulated that the timber in Levy County, with an extension of five years' additional time in which to cut the same, sold in December, 1915, for $400,000.00 less the cost of extension and selling commissions and carrying charges; that the extension referred to was an extension obtained during the pendency of the contract and before the breach thereof by P. D. Camp and over Mr. Gress' protest.

And this being all the evidence introduced by the plaintiff, counsel for the defendants thereupon moved the court to direct the jury to find a verdict for the defendants, which motion the court overruled, and the defendants then and there excepted.

And thereupon, the defendants, to maintain the issues upon their part, without waiving their objections to the testimony offered on behalf of the plaintiff as to the depreciation in the value of the mill plant, introduced on its behalf the following evidence:

J. A. WILLIAMS, a witness for the defendants, being duly sworn, says that he is superintendent of the Camp Manufacturing Company, which position he had held for about ten years; that he looked after the operation and handling the lumber from the log ponds to the cars for that company and superintended the whole procedure. That he had recently examined the plant known as the Morgan Lumber Company plant near Jacksonville, Florida, on November 2nd and 3rd, 1916; that he examined the portion that was not burned; that he had an insurance map of the property showing the positions which had not been burned, which map he exhibited to the jury. That just the sawmill and a portion of the tramway leading to the kilns and part of the tramway and a little of the lumber dock and a part of the dock had been burned; that he estimated the value of the unburned portions of this plant at $74,500.00; that he made a detailed statement of the value placed on each part thereof, which he exhibited to the jury, and it is filed in evidence, and is as follows:

59

"Memorandum of Property Not Destroyed by Fire When Gress' Mill was Burned in the Spring of 1916.

6 150 horse boilers steel setting	$18,000.00
1 boiler feed pump	300.00
Lumber dock—148 x 360	5,000.00
Plainer Mill Building	6,000.00
3 Machines	3,000.00
1 Resaw	1,000.00
1 Band Rip	750.00
1 Circular Rip	250.00
1-2 Saw Times	300.00
Shafting Bars & Pulleys in P. M.	1,000.00
P. M. Engine & foundation	1,000.00
1 150 hrs. Boiler—steel setting	3,000.00
P. M. boiler house & shaving vault	500.00
P. M. Blower system	2,000.00
P. M. File room, machinery, saws and extras	2,000.00
Lumber carts	1,200.00
2 Pile Railroad tracks 175 ft. long	1,800.00
1 Marine Railway	500.00
1 dress- lumber shed 30 x 200	1,000.00
2,500 ft. of tramway 16 ft. wide	2,000.00
5 transfer cars	100.00
Piling shed in front of kiln	200.00
3 Dry kilns 20 x 104	6,000.00
3 tons of 20 and 25 pound rails	100.00
1-1000 gallon pump, tank and pipes	5,000.00
100 tons of scrap iron	800.00
Ties and grading standard Railroad track	2,000.00
9 4-room houses	3,600.00
1 Hospital	$200.00

1 Boarding House	800.00
60 1 Club House	800.00
1 Store	800.00
2 dwellings for foreman	1,600.00
1 office and fixtures	1,000.00
1 stable	100.00
1 old dock 60 x 130	800.00
Total	$74,500.00

Continuing, he said that to the best of his judgment in money value about 40 per cent of the entire plant was destroyed by fire; that he had never seen the original plant, but did see the plant as rebuilt; that in his statement there are nine 4-room houses placed at a value of $3,600.00; that those were all the houses he saw; that he had heard Mr. Gress testify here today that there were 40 others, but that he could not find them; that if it is true there were 40 odd houses there, all over the nine would have to be added to his estimate.

On cross-examination, he stated that he spent a part of two days in making his examination; that he examined far enough to count the number of piles, figure the number of feet of lumber in the rough lumber dock and in the planing mill, and to get the number of machines, and in all was engaged about 16 hours, and that he devoted a part of that time to measuring the lumber dock for the purpose of ascertaining what it would cost to build it, and that he figured the number of feet, and what it would cost to work it. That he did not know when the dock was built, and did not know the average life of a dock in the waters of Jacksonville; that he had built a lumber dock at Franklin, Virginia; that he had never built a dock of the character of the dock that he examined at Jacksonville. That his valuation of the dock was as of the date that he saw it; that he found part new timbers in the dock; that he valued the piles at $5.45 each; they were pine piles; some were creosoted and some were not. He would say from what he saw that the value of the part of the mill that was burned would be about $50,000.00. That he had heard Mr. Gress testify that the insurance company paid $57,000.00, and that it was a very satisfactory adjustment, and he (the witness) thought there was a loss of $50,000.00. He valued the club house, a one-story building, at $800.00, but did not go inside
of it, and did not know how many rooms were in it. He had
61 one of the best contractors in Jacksonville to put an estimate on it (Mr. Hillyer). He put his valuation on this property as an operating proposition. He did not attempt to estimate its value as disconnected from timber, and did not estimate is as a scrap proposition.

J. UPCHURCH, another witness for the defendants, being duly sworn, testified as follows: That he lived in Jacksonville, Florida, and has been engaged in the sawmill business 30 years and over; that he knows the timber mentioned in the suit as Levy County timber, and has been over it, and that he negotiated with reference

to the purchase of this timber in September, 1915. He examined it in July and some in August, 1915. He examined it for the purpose of deciding whether or not he would buy it; that he rode over the property pretty well, and had a pretty good idea what it was worth; that he went over it with the idea of taking the value of it, and to see what the company would pay for it; that he thought between $300,000.00 and $350,000.00 would have been a pretty fair price for it in July, 1915, and that this figure was with the five years' extended time in which to cut it; that without the five years' extension, so far as he was concerned, he would not have wanted it. He does not know what it would have been to others; that *that* it would not have been enough time for him to have gotten it off; that he would imagine the timber was worth about the same in December, 1914, that it was in July, 1915. That he was familiar with the timber market from year to year; that in 1914 the lumber market was very low, and was getting better in July, 1915,—that in July and August it commenced to get a little better. That he operated a saw mill, and had a number of years' experience in that; that a plant four years old, with a man to keep it in repair while he runs it, will depreciate in five years, if kept up, but very little. There might be a little timber rotting out, or something like that, but if the machinery and other things are kept in good repair I believe it is better—that is for a going plant; that ten or fifteen per cent would cover depreciation.

On Cross examination, the witness continued: The timber is in Levy County, about 44,000 acres, is my recollection. I went over to see it in the interest of my concern; had no price on it. This was in July of last year. Saw some evidence of fire having
62 gone through in the spring of 1915. The timber had been turpentined, considerable of it dying, when I saw it in 1915. That fire had injured it somewhat. He could not say definitely just how much of this timber he examined personally. Was on the land two or three times on two or three different parts, but could not tell what portions he saw. Never noticed the cypress, only looked at the pine. His mill plant was 30 miles from there. The capacity of his mill was 50,000 feet a day. He stated that if he had bought it he did not know whether he would have manufactured it at his mill, or not. Could not say whether it is to the interest of every mill man to cut timber as early as possible, because he don't think he ought to cut it unless the market conditions were right. That, assuming that timber has been turpentined to the limit and conditions are satisfactory as they are now, would cut it as far as he could. Could not say what was the difference in fair cash market value of a mill plant costing $165,000.00 four years old with an ample supply of timber for five years and the same mill plant located at Jacksonville, Florida, cut off entirely from timber; that a man could not saw wind with a sawmill, and he had a very little use for a sawmill without timber. That, so far as he knew, the timber accessible to Jacksonville, by rail or water, for a great many miles, had been cut away. That he had lived in Florida for a great many years; that, so far as he knew, there

were few tracts of 44,000 acres left in the state. That the fair market price, in December, 1914, of Levy County stumpage, excluding cypress, of the character he saw would not be worth very much because the timber market was very low; that stumpage had moved up and down to a certain extent in harmony with the lumber market—that is, to a very small extent. In some places stumpage was lower than it had been for a year or two back in small lots where it was inaccessible to transportation and in small quantities. That he knew nothing about the cypress business; that his judgment would not be affected by the fact that this property was sold for the sum of $400,000.00; that he was giving his own opinion.

On redirect examination he stated when he figured on value of stumpage he was referring to stumpage in which he was operating; that the question of whether he would have cut his stumpage in December, 1914, would have been affected very materially
63 by the lumber market. Does not know whether Mr. Rentz is still manufacturing timber at the same mill.

C. P. MELTON, being duly sworn, stated as follows: That he lives in Florida, engaged in logging and cross tie timber on the St. Johns River; formerly was engaged in the sawmill business for about 17 or 18 years. Thinks that he is familiar with timber values in the State of Florida, and has kept in touch with the lumber market during the past three years as to variations in price. That he has examined the timber in Levy County, in question in this suit, because it was offered for sale and he figured on buying it; that he examined it in May, June and July, 1915. In his opinion the value of the timber, when he examined it, was about $300,000.00 with the additional five years' time in which to cut it; without the five years' additional time he would not have had any use for it with that short time. From his investigations in May and June, 1915, he should say that the timber in question was worth about the same, or about $300,000.00 in December, 1914, with the additional time in which to cut it; without the extension he (the witness) would not have wanted it, and thought you would have to sacrifice it to some extent to sell it. Does not know to what extent it would have to be sacrificed; in fact, did not think it could be sold in December, 1914, at all because he does not think there was any demand for timber in 1914 in Florida; everybody was too busted—he was. Could not give an idea as to what it would have sold for in December, 1914, if it had been sold. He thinks Levy County timber was worth practically the same in August, 1913, as when he saw it in 1915, though he did not see the timber in 1913. Lumber market conditions were about the same in 1913 and in 1915; lumber market conditions were very poor, lumber selling very low in the most part of the year 1914. It began to go up a little in the spring of 1915, and declined in the latter portion of 1915. In witness' opinion there was perhaps 40 per cent of the total amount of timber on the land in question 14 inches and less in diameter two feet from the ground. In witness' opinion a sawmill which is four years old, leased to a man for a term of five years who had to keep

it in repair, would depreciate ten or fifteen per cent, if kept in repair, in the five years' time.

64 On cross examination, witness said he examined the timber in 1915, May, June and July; made three separate trips; the first one day in May; in June and July between four and five weeks. Property had been offered to him for sale by P. D. Camp, of Franklin, Virginia. He went to Franklin after he saw the timber the first time. After he spent the first day on it he saw Mr. Camp, and then spent four or five weeks on it, and afterwards talked with Mr. Camp and had the timber under offer. Was accompanied by Mr. Dunning, an expert estimator of the Camps. Mr. Camp offered him the property at $350,000.00 in May, 1915. Neither Mr. Camp nor Mr. Dunning made any representation as to the stumpage; proposed to sell all the pine and cypress on the lands or portions of the land. He included the cypress in his estimate, and thought there was 10,000,000 to 14,000,000 feet of it. Tried to sell the cypress at $4.00 a thousand to the Wilson Cypress Company. Wanted the pine for manufacturing; wanted to sell the cypress. Expected to manufacture the timber at Palatka, 118 miles from the timber. Figured freight rate from Levy County to Palatka was $3.00 per thousand; Palatka is on the St. Johns River 55 miles by rail and 75 by river from Jacksonville; no considerable amount of ocean traffic going to Palatka; lighterage from Palatka to Jacksonville was $1.00; freight rate from Levy County to Palatka is about $3.00. That a sawmill plant built of pine and in operation in Florida would depreciate ten to fifteen per cent, if it is kept up, in five years; that contemplated that if the timber rotted the man would simply put in new, or if a boxing in the shaft went bad he fixed it, and if some piece of machinery was not good and serviceable he would replace it; that if it was on a concrete foundation it would last forever; that a sawmill in Florida will last 30 to 35 years; that he had never worn out a piece of machinery; that, in his judgment, sawmills in Florida last 30 to 35 years, but that most of the timber would have to be replaced in that time a number of times. The dock will last from six to eight years. The life of piling from six to eight years. That when he was talking of the value of the extension he had in view his own plants and circumstances. That he could not get out logs enough to manufacture 150,000 feet a day; that he would not be able to get equipment and negroes and mules enough; that he had never seen it done in Florida; that the O'Brien mill was getting 100,000 to 125,-

65 000 feet a day; did not think they were cutting 200,000 feet, and did not think that they were running night and day. Knew there was no limit to amount of mules and skidders a man could buy if he had the money; that he did not think it was a good plan to have an excessive number of laborers, or to try to operate too fast; that the limit of the manufacture of a man with means and experience in Florida was about 75,000 feet of logs from one camp. He knows Mr. C. P. Rentz; has heard that he has run two or three days a week; does not know of his own knowledge; does not know how much he is logging; does not know

of his own knowledge that he is running 150,000 feet a day. Thinks the market value of the mill plant at Jacksonville, Florida, five years old, costing $165,000.00, cut off from timber (just the mill) would depend entirely on whether or not the owner could get more timber; that within one hundred miles of Jacksonville large tracts of timber profitable to manufacture have been exhausted. If you want to go 100 miles from Jacksonville you could do so almost as advantageously as you could within 100 miles limit, not exceeding 150 miles, from Jacksonville, and he thought he could get considerable timber to put up to such a plant. That in Lafayette County you could buy yellow pine stumpage at $3.50 on a 40,000 acre tract; does not know of a tract of 40,000 acres within 150 miles of Jacksonville. It would not pay to connect up a mill of that kind to cut the timber from less than 40,000 acres. The mill, if junked, would bring from $20,000.00 to $25,000.00. A dock lasts from six to eight years. That when he spoke of market conditions he referred to manufactured lumber. Stumpage did not stand still until the last 18 months, when it was a little lower. Since then the tendency has been to sell. Necessity requires people to sell, and they have offered it cheaper than in the last five or six years. That is due to the excessive hard times. Turpentining has not much to do with it. Lumber conditions since 1908, together with financial conditions, have forced people who had stumpage to sell where they could; thought the same conditions in the turpentine business had forced people to put it on the market. Within the last 90 days the market conditions in the lumber business have improved. He knows Mr. Camp, who is a representative manufacturer of lumber; he knows Mr. Gress, head of the Gress Manufacturing Company—one of the largest distributing manufac-
66 turers in the south, handles cross ties, and is in position to stay in touch with the lumber market.

Saw evidence of the fire in the timber in 1915, when he examined it; fire goes through all Florida timber every spring—that is, with few exceptions. Did not know whether the timber had been raked before the fire went through; did not think so; saw evidences of fire in the spring. Timber had been turpentined pretty thoroughly. The higher it was turpentined the more damage it did. Advance in lumber began 90 days before. Mr. W. R. Galligher estimated the cypress for him. Knows the Rodman Lumber Company; knew the Rodman Lumber Company at Palatka; Mr. Cumming was at the head of it. Knew that they had bought the timber in question from the Camps. Mr. Cumming was one of the most successful and experienced mill men in the state. Has heard that the company had sold the cypress, but did not know the price. Stated to the court that he was offered lumber May, 1915, for $350,000.00, including the five year extension.

On redirect examination, witness continued: Knows the property belonging to Mr. Rentz, located in West Florida, 140 miles from Jacksonville. Levy County is 160 to 165 miles from Jacksonville; knows the freight rates in Florida; that the freight rate from any

point on the Atlantic Coast Line Railroad to any other point say from Levy County to Palatka is the same it would be for the same distance to some other station on the Atlantic Coast Line. Knows there are tracts of standing timber in Florida available to purchase—large tracts. The price of stumpage on timber would vary the further you went west from Jacksonville, or south from Jacksonville. The price west is higher than if you went to the south. Two tracts containing between 11,000 and 12,000 acres, the two adjoining and unmixed with each other, were offered to him on the basis of $3.00 per thousand feet in the last sixty days; made no estimate on it. The quantity was to be determined by the cut. Did not think that the skidders, mules and other paraphernalia of a big operation could be disposed of to advantage at the end of the operation.

On recross examination, continuing, witness said price to him for the lumber was $350,000.00. Camps were willing to enter into contract at any time. He was to get all the timber
67 on the land. Does not recall that he was to get the cord wood. Thinks that was reserved in the lease to the Camps. Was to get the cross tie timber. None of the turpentine privileges were reserved to him; they had all expired. The cedar trees were not included. They had been previously sold. He was to cut everything the Camps had under their contract.

JAMES E. RAWLS, another witness for the defendants, being duly sworn, says he lives in Florida and is engaged in phosphate mining. He negotiated the sale of the lumber in question to Rodman Lumber Company the latter part of the year 1915; price placed on this timber when it was first given to him to sell was $375,000.00 including the five years' extension; that was in the early part of 1915. Worked on it and tried to sell it, but was unable to find a purchaser. Along in the fall of 1915 a price was given him at $390,000.00. About the first of November, 1915, he found a purchaser for it and sold it for $400,000.00, out of which the Camps paid a commission of $10,000.00 and the purchaser assumed, as a part of the $400,000.00, $15,000.00 which was then due by the Camps on account of the extension of the contract for a further period of five years; the Camps had already paid $10,000.00 on account of said extension, so that the Camps got net $365,000.00 for the timber.

Witness stated that he was familiar with timber values in Florida; that he had been practically in charge of the timber for the last five years; that he had been going on it since 1903; that it is hard to say what it was worth in 1914; there was not any market for it, and could not find anybody that wanted to buy it; that he could not find any purchaser for it in the early part of 1915, when it was put in his hands, at $375,000.00; thinks Rodman Lumber Company paid a big price for it; thought it was worth twice as much with the extension of five years as without it; thought the timber in 1913, as conditions were then without the extension, was worth about $275,000.00.

On cross-examination, the witness continuing, said his opinion

was not affected by the price of $325,000.00 placed on the property in 1913 by Mr. Camp. That his business was mining phosphate, connected with the C. & J. Camp Phosphate Plant; had been out of the lumber business since 1907; that the average price of yel-
68 low pine stumpage in 1907 depended on the location; that timber on a location like the 40,000 acres in Levy County, off from the railroad, was not worth as much in 1913 as it is now; that it was worth more than $1.00 in 1907; that he sold the timber to the Rodman Lumber Company for the Camps as their agents; that he made no representation to the purchaser; told them we were selling the Camp property as a whole, that the purchaser would have *it* to be his own estimator, would have to go and look at it, and that we would sell what rights we had; that there were 44,000 acres in Levy County; that we were selling everything we owned in Levy County; that he had never estimated the cypress, but was told there were 10,000,000 feet; saw only a portion of the cypress; considered that he saw all the pine; he had been over all the land; had not seen it as a whole; had been on each section—on a part of the section of the cypress but did not go into the cypress swamp; thinks the cypress was estimated some years ago at the instance of the Camps; understood it was estimated about 10,000,000 feet; did not know the market value of cypress in December, 1914; never dealt in cypress; was in the phosphate business the first five years after he went to Florida, then in the sawmill business, and then went with the Camps' Phosphate plant. The commission was paid to A. P. Cobb and myself; he brought me the purchaser. The Rodney Lumber Company paid $400,000.00 for the property and got all the Camps had—cypress, pine, wood, and everything else; could not say exactly when Mr. Camp put his property in my hands for sale; some time in the early part of 1915; would not say what month, but it was in the early part of the year; thought it was in the spring. Did not have instructions to sell it until just before Mr. Melton came down to look it over.

R. J. DUNNING, a witness on behalf of the defendants, being duly sworn, testifies as follows; that he lives in Norfolk, engaged in estimating timber for about 25 years; has estimated a great many million feet; spent practically his entire time at it; has been over the Levy County timber in question in this suit. Had no experience in Florida timber except in this line; has been over other tracts of timber in Florida, and thinks he had a pretty good idea of value at that time. Was acting as agent for the Camps in selling this timber to the Rodman Lumber Company; worked through Mr. Rawles'
69 negotiations; had been through this particular timber a great many times in 1913, 1914 and 1915, and spent several months each year; has been thoroughly through this timber a number of times. It was impossible for him to sell it in December, 1914; he tried very hard, and could not get any offer for it in 1914. He was figuring with Mr. Gress and Mr. Camp to go into the proposed Levy County Lumber Company by buying an interest with them; he was interested in 1913, when that contract was made, they having

offered him a proposition about logging it, provided the contract wa carried out. He considered it in 1913, but in 1914 would not hav anything to do with it. Lumber in 1914 had declined, he unde stood, on all markets, and the value of this timber, at that time, h did not consider worth $200,000. He would not have bought it if h had had the money at that time. This time for cutting the timb under original contract expired in 1919. Contract for extension five years was negotiated in 1913, and closed up in the year 1914 h him. Extension, in his opinion, was worth at least 50 per cent, an he could not have sold this lumber in 1915 to any advantage witho the extension; was given a price of $350,000 on the timber in th spring or early summer of 1915, the purchaser to get the extend time. Could not find a purchaser at that price.

On cross-examination he stated he had been in the service of th Camps about thirteen years; was fourteen years before that wit other companies; have been a great many years in the business. Wi ness represented the Camps in the early negotiations with Gress i the matter of entering into the contract for the organization of th new company, and does not recall the exact estimate which he the put upon the number of feet in the tract. Including the timber, ti and dead timber, down timber and the cross ties he showed M Greene, representing Mr. Gress, figures which amounted to 170 000,000 feet altogether. Mr. Gress argued that he would not cut th kind of stuff. Thinks $325,000 in August, 1913, was a fair valu for the timber; that he was not up on the market today, and does n know how the market today compares with the market in Augus 1913. Was willing, when the contract was first made, to take sto in the Levy County Lumber Company. That he expected to cut
the short lumber at that time and sell on the basis of $20.00
70 thousand. That, at that time, the extension had not been o
tained, but they were negotiating for it; that, in his opinio the extension doubled the value of the property in 1914. The w ness did not intend to testify that he was an expert in the matter values of lumber; that he was a timber man; that there were abo ten million or fifteen million feet of cypress on the tract; that could not tell whether it was worth $10,000 in December, 1914, not, because the market changed so rapidly. That he did not kn what the Rodman Lumber Company had sold the cypress for; th he figured that the fair market value of stumpage on the tract question, pine and cypress, in 1913, was about $3.00 per thousa feet; that the cross tie stumpage was changing, was not steady, a that it was considered in that country about ten or twelve cents p tie, or about $2.50 per thousand. Witness stated that a great deal the cypress would not bring $2.00 a thousand, and that a great d of the small cypress and small pine would cost more to get it out th it was worth; that, in his opinion, it would not now sell for $5.0 and that the minimum average price in 1913 of cypress was abo $3.00, and that cypress was worth about the same as pine standi in the swamp, because it would cost more to get it out of the swa than on the highland; that the cross tie stumpage was worth abo $2.50 a thousand, and the yellow pine stumpage about $3.00. Th

there would not be over 100,000,000 feet figured at these prices, and that 70,000,000 feet of cross ties would not be worth $1.00 a thousand, and that he still thinks $325,000 a fair price at that time. That he knew that the contract between Mr. Camp and Mr. Gress had been made, and that he then proposed to go into the company and take stock in it himself, and that he does not know whether the market conditions are better today than they were then; that he did not agree to go into anything while the war was on. That he went over the timber with Mr. T. N. Greene and spent several weeks.

R. E. L. WATKINS, a witness on behalf of the defendants, being duly sworn, testified as follows:

That he was a lawyer, and lived in Franklin; that he had been counsel for Mr. P. D. Camp; met Mr. Gress, and thought it was in December, 1913; only met him once. There was a discussion between Mr. Gress and Mr. Camp whether they should put the
71 contract into effect. Mr. P. D. Camp and Mr. P. R. Camp and Mr. Morgan Gress and the witness were present at the Stonewall Inn, at Franklin. Mr. Gress stated to Mr. Camp "Let's agree to permit things to remain in abeyance until the lumber is worth $20.00 a thousand f. a. s. Jacksonville, Florida. Mr. Camp refused.

On cross examination, witness continuing, said he heard all the discussion between Camp and Gress, at Franklin; heard some discussion as to operations; Mr. Camp explained to Mr. Gress on account of conditions in his family, general conditions, that he could not give supervision to the work. Mr. Camp suggested to Mr. Gross that he take charge and operate the plant. Mr. Gress replied "I have all the money I need and all the business I can attend to." He knew that the company had not been organized; heard discussion about it, practically every word; heard Mr. Camp say on account of the condition of the market and on account of the condition of the health of members of his family that he was unable to take charge of the operation of the plant; he suggested Mr. Gress take charge and operate the business. The organization of the Levy County Lumber Company and the conveyance of the properties to the company, in accordance with the contract, was not discussed in his hearing; he does not recall it, nor did he recall that Mr. Camp referred to the fact that he had written Mr. Gress to be relieved from the contract; I did not think at that time that Mr. Camp had written the letter; would be helped if the letter was shown him; dictated a good many letters in connection with the matter; dictated one letter to Mr. Gress, in which he thinks Mr. Camp said that the cancellation of the contract ought to be had. After identifying letter of December 5, 1914, shown him, stated that it was after the date of this letter that the conference occurred. The conference to the best of his recollection, was before this letter, in 1913, about the 30th or 31st of December. Letter referred to is offered in evidence, and is as follows:

NOTE.—The same letter appears in the testimony of Mr. Gress.

B. E. MARTINGALE, a witness on behalf of the defendants, being duly sworn, testified as follows:

72 That he lived in Duval County, Florida; in the saw-mill business 35 years; have bought and sold lumber, and familiar with the value of timber in Florida; familiar with the mill belonging to the Morgan Lumber Company, at Jacksonville, referred to, and operated the mill about ten months, beginning in November, 1912; is familiar with the capacity of that mill. That it is not possible for the mill to have cut 160,000 feet in 24 hours; that the maximum capacity of the mill, while he was in charge of it, varied with the logs; that he would say on an average it would cut about 80,000 feet; that when they cut 84,000 feet they generally had a little lumber on the mill deck that they could not get down over the dock, but that could have been remedied by an additional outlay. That the capacity of the mill could not have been increased to an unlimited amount, no matter what the outlay, but it could have been increased. That the extension of five years made the timber proposition much more valuable. This was undoubtedly true, considering the distance from the mill and the mishaps which could have been caused by not getting the logs in, etc. It would have been much more valuable with a longer lease; that the longer lease would have enabled them to market the products under reasonable conditions and not absolutely under the control of the buyer. The operator would have had opportunity to get better prices for his lumber, and he thinks the extension added to the value of the property from 40 to 50 per cent.

Cross examined, the witness continuing, said he thought he operated the plant from November, 1912, to September, 1913, for the Morgan Lumber Company. That with logs which would run six and a half to the thousand it was comparatively an easy matter in ten hours to cut 80,000 feet; that ten hours' time was a regular day; that the mill was equipped with electric lights; that he had had no experience with night work, and did not think, without some improvements, it could have been operated at night; that he does not know now whether it is being operated day and night, or not. "When I operated the mill the bulk of the timber came from up the river in rafts, and got two or three big rafts a week." If the logs had run four to the thousand could have cut 100,000 feet a day, running ten hours, about two and half million feet a month.

73 That the value of an extension depends on a number of different conditions; that if he had a mill of the capacity of 80,000 feet a day and a lease on a tract of timber that had been turpentined to the limit, and it appeared that he could cut at that rate 80,000 feet a day, with the lease going for five years, allowing for an additional year for shutdowns, and things of that sort, that he would not consider it a sound, sensible investment to buy the extension, that is, if he had a year's leeway to get the timber off, that would be plenty of time; that he would not do it merely for the purpose of speculating on the market with timber that was not turpentined; that if he could gain by paying for the extension he would do it; that if his timber had been turpentined, was exposed

to the teredo worm, fire and storm, he would want the extension any way. That if he had his own way to sell the output he would be willing to pay from 25 to 40 per cent more for the stumpage with plenty of time; that this was true even if the timber had been turpentined if it is taken care of—that is, if a man looks after it and puts out the fires. That he did not see how it was possible to operate this mill on a night shift except by remodelling the rear end and providing additional space to take care of the lumber, because if they had not got the facilities to move the lumber they would have to shut down for lack of space to store it. That he found the dock decayed in places, did not find any defective piling at that time. Does not remember when the average price of yellow pine stumpage, four or five logs to the thousand, was $1.00 per thousand in Florida; has never seen that kind of stumpage at that price in Florida, but had in Georgia; that half of his mill operations had been in Georgia. That he could buy stumpage in Florida lower now than he could five or six years ago, because so much of the turpentine had been taken and operators can afford to sell it; they do not want to take care of it. Has several deals on hand now selling materials to parties; some of them are now being worked as the stumpage is considerably cheaper. That he would have taken for it three years ago what he priced it for at that time. There is a good deal of selling all over the state. The quality of timber governs the time to some extent; that the difficulty in increasing the output from the mill was not in the mill itself, but in the capacity to handle and store lumber; that the question of running it day and night was a question of getting it out of the tail end of the
74 mill; did not think it could have been handled at a profit.

J. L. Camp, a witness on behalf of the defendants, being duly sworn, testified as follows:

That he is a brother of P. D. Camp; lives at Franklin, Southampton County, Virginia; has no interest in this suit; is an officer of the Camp Company; is familiar with the details of a sawmill, with forty years' experience. That a mill four years old, turned over to a lessee for a period of five years under a contract requiring the lessee to keep it up during the operation, ought not to decrease from ten to fifteen per cent at the outside. Know- something of the timber property known as the Levy County Lumber Company; belonged in 1913 to the Crystal River Lumber Company. That he had been through the timber one time a number of years ago when it was first bought; had bought a considerable amount of timber in his life; knows a good deal about timber. In his opinion the timber was worth in August, 1913, $325,000; did not think it was worth any more than that without the extension; thought the timber was worth a good deal more with the extension, because if the market is not good you do not have to put it on the market, and you have a good long time in which to operate, and do not have to cut it so quick. Thinks that the price in the spring of 1915 put upon the property was $350,000; does not remember clearly. The lumber

market was very much better in 1915 than in 1914—that is at Franklin; does not know how it was in Florida. Prices were better in 1913 than in 1914—very much better. There was a considerable decline in lumber from the beginning of the war, in 1914, up to the end of that year.

On cross examination, witness said that he thought that the value of the extension depended on the price charged for the extension, the cutting capacity of the mill (if the mill was able to cut the timber) market conditions, and whether the timber had been so turpentined as to expose it to fire and storm; there is room for difference of opinion as to the wisdom of securing an extension of a lease for standing timber.

75 P. R. CAMP, on behalf of the defendants, being duly sworn, testified as follows:

That he is a son of P. D. Camp, one of the defendants; saw Mr. Gress in Franklin, Virginia, several times; heard his testimony about visit to Franklin the latter part of December, 1914; was in the room with Mr. P. D. Camp and Mr. R. E. L. Watkins, at Franklin, when Mr. Gress entered the room. His recollection is that Watkins, his father (P. D. Camp), and Mr. Gress met in the ladies' parlor of the Stonewall Inn, at Franklin, December 13, 1914; Gress had come on the Southern train at ten o'clock, and they immediately met him. After general conversation something was said about the business; his father told Gress that on account of the depression in the lumber market and the necessity of devoting his entire time to his other business, that he would be unable to carry out the proposed agreement; Mr. Gress said that that was perfectly all right, that he knew the lumber market was low, and that he was willing to leave the contract in abeyance to stay exactly as it was until lumber was $20.00 a thousand f. a. s. Jacksonville, Florida. Mr. Gress left on the Seaboard at 10:30; he rode with him on the train. During the ride Mr. Gress repeated his statement to leave the proposition in abeyance until lumber was $20.00 a thousand f. a. s. Jacksonville; he left Mr. Gress at Thelma, North Carolina. Mr. Gress had repeated at least a dozen times between Franklin and Thelma the proposition between him and his father. Mr. Gress said at the interview in Franklin that the lumber market was so low that he was sure it would be a loss to all concerned if they tried to operate it. That he was familiar with the contract which the Atlantic Coast Line Railroad Company wished them to sign; that he went to the office of the company in Wilmington several times in reference to it. The contract shown witness is a revised contract. That Mr. Gress urged the execution of this contract, and if it had been signed it would have resulted in great loss.

On cross-examination, witness stated that he was one of the original parties to the contract with Mr. Gress; that he conducted the negotiations with the Coast Line. Mr. Gress came to Franklin on December 31, 1914; that they left the office and met him at the Stonewall Inn, his father and himself, and later they were joined by

76 Mr. Watkins. Mr. Gress was alone. Mr. Watkins was present, because he was familiar with the correspondence. Did not hear Mr. Gress state the purpose of his visit; said he came to discuss the matter which Mr. Watkins had written about on the 5th of December. Had not seen Mr. Gress' reply to that letter. Mr. Gress said that he was willing to leave the contract in abeyance until lumber was $20.00 a thousand f. a. s. Jacksonville; that such a provision was not with reference to operation, was not on the contract. The company had not been organized; that they were willing to leave the matter without organization; that he had seen the correspondence between Gress and his father urging the execution of the contract for the organization of the Levy County Lumber Company, but not the operation under the contract. That Mr. Gress might have urged the organization of the company, but he said that he was willing to leave it in abeyance, using his own words, until lumber reached $20.00 f. a. s. Jacksonville; that Mr. Gress might have mentioned the organization of the company; that the contract provided that the company should be organized and the property conveyed; that the reason he did not do it was because on account of the market conditions, which had changed very materially from 1913 to the date of this meeting, and because that on account of my father's health and his brother, and the loss of his father's nephew, the business in Franklin required our entire time. His father told Mr. Gress that he could not take charge actively and manage the business. He said "Mr. Gress, you can take charge and operate it." Mr. Gress said he had all the money that he wanted, all the money that he needed, and all the business that he wanted to attend to, and he would not go into it for any amount of money to actually operate it. They told Mr. Gress that they would not carry out that contract.

On re-direct examination, witness stated that Mr. Gress said that he was willing to leave the contract in abeyance until lumber was $20.00 f. a. s. Jacksonville.

P. D. CAMP, on behalf of the defendants, being duly sworn, testified as follows:

That he is 68 years old; hearing bad; lives at Franklin, Virginia;
77 President of the Camp Manufacturing Company, President of the Crystal River Lumber Company; the stock of the Crystal River Lumber Company is owned by the Camp Manufacturing Company. He conducted the negotiations out of which this suit grew, and signed the contract offered in evidence, which was the final outcome of the negotiations which had preceded it between him and Gress. After the contract was drawn up, the agreement to convey the two properties, Mr. Gress asked him to see the Coast Line to see what contract they could get. He met some of the officials in Jacksonville, and they submitted a contract; the contract was sent to Wilmington, where he went and met the officials. They submitted a contract requiring them to furnish a train load of 30 cars to the train three times a week, and if they did not furnish that number of cars they had to pay just as if they had—that is $15.00 per car; that to

have executed this contract would have cost them the entire property that he was not familiar with the manufacture of lumber in Florida but from the information he got from Mr. Gress and others con cluded that it would have been a loss of from $2.00 to $3.00 per thou sand on every thousand feet of lumber cut from that timber to operat this plant, and so told Mr. Gress. Mr. Gress said his judgment wa right, and if we operate the mill there would be a heavy loss. Mr Gress wrote and asked if he could meet him in Franklin, that he would be there on a certain day. He came to Franklin December 31 1914. He and his son met Mr. Gress at the hotel. Mr. Watkin came along as attorney, if they needed one, to draw up any papers they discussed this matter, and he told Gress that owing to the death of his nephew, who was a main salesman in the company, the sick ness of one of his brothers, who was very sick with rheumatism, and another brother whom he did not expect to live but a short time, he under those conditions, could in no wise take charge of the plant, neither could one of his boys, and that they had more than they could do at home to look after the property, and asked if Gress was willing to take charge of it. He said "Mr. Camp, no, not under any considera tion. I have all the money I want, I don't need any more, and I would not undertake to operate a sawmill for any amount of money." They discussed it in a way, and there was no word of unpleasantness between them, and after discussing it he told them that they could not sign the contract for the reasons he has stated. He stated that he referred to the railroad contract. He, the witness, stated that
78 they had not organized the company; he thought it would be unwise to take over the property; each man had had charge of his properties and had utilized the properties as if there had been no negotiations between them; that he, Gress, controlled his property and never consulted with him about it except a little at first—one or two letters; that he had never consulted Gress about the exten sion after he first discussed this matter of the extension. When the parted they were right close to the hoted, and Mr. Gress said "Mr Camp, I am willing that this matter shall be in abeyance until lum ber is worth $20.00 f. a. s. Jacksonville, including boards and every thing that passes through the saw for merchantable lumber." That was after Mr. Gress had brought up the matter of forming the cor poration for the purpose of taking over the title. That in 1913, when the contract was entered into, the timber was put in at $325,000, but his company would have been glad to take $300,000 on the day they agreed to it; that the timber was worth more on the 31st of December 1914, because they had four years longer time in which to cut it then they did when they first started negotiations; that if they had not secured the extension it would not have been worth more than half, if it had been worth that, as compared to what it was in 1913. If they had not gotten the extension they would have lost practically half of the timber, if not more; that they had discussed the matter of the extension with Mr. Gress either he or his son in person, he could not say which. Mr. Gress opposed the extension, and was not willing to pay any part of it. That they offered this property for sale during the first six months of 1915 at

$350,000, they to pay for the extension; that that made the price the same as the price at which they put it into the combination—$325,000. That they offered it for sale at $325,000 plus the $25,000 on account of the extension; that they had carried it two years longer with interest charges and advances in the neighborhood of $30,000 a year. That he saw the sawmill, but was not a mill man; that he saw the mill in 1913; he was not positive whether he saw it in 1914. He thought the mill was worth practically as much in December, 1914, as in August, 1913; that he had a statement showing what the property would have netted the Crystal River Lumber Company if sold in 1913 at $325,000, and what it would have netted if sold in 1915 at $400,000. That the commissions paid were $10,000, and the extension cost $25,000.

79 Witness stated that out of the $400,000, for which the timber in question sold December 17, 1915, they had paid out a total sum of $48,815.55 for extension of time, commissions for selling, taxes on property and maintenance of the property, which amount is made up of the following items: Commission paid for selling the property to Rawles and Cobb $10,000; extension of time from the Florida Syndicate $25,000; interest on extension note at five per cent $1,959.25; interest on payment on extension note at six per cent $633.65; taxes for 1/12 of 1913 $120.02; interest on 1913 taxes at six per cent from December 8, 1913, to December 17, 1915, $14.58; taxes for year 1914 $3,284.16; interest on 1914 taxes at six per cent from April 9, 1915, to December 7, 1915, $135.75; taxes for 1915, less 14 days, $4,381.70; amounts paid different parties for looking after the property, etc., $3,201.65; interest on same at six per cent $84.80—total, $48,815.55.

Witness stated he had seen and identified a circular describing the plant of the Morgan Lumber Company, issued by the Morgan Lumber Company. Witness stated that he had received letter from the Morgan Lumber Company dated December 28, 1915, enclosing the circular and addressed to the Camp Manufacturing Company, signed "M. V. Gress." That he and his associate owned a tract of timber known as the Jackson Tract, divided from the Levy County Lumber Company by a river, the tracts estimate- by Mr. Brayten at 72,000,000 feet and the tracts contained 11,500 acres of land in fee and 1,680 acres timber rights. That they offered to sell this for $160,000 and had been unable to find a purchaser.

On Cross examination, the witness stated he did not make any contract to rent the mill; did not recall paying $500.00 for an option; recognized the option offered him as bearing his signature; did not have any recollection having paid the $500.00; did not rent the mill; might have discussed an option at a minimum rental of $20,000 net; does not remember positively. Did not pay any money. If the contract recited that he paid any money it is a mistake. Did not think Mr. Gress would testify that he paid him. Takes options many times on property just to investigate. Option heretofore referred to offered in evidence, and is as follows:

"Option Contract between Morgan Lumber Company, Lessor, a corporation of Florida, and P. D. Camp, Lessee, of Franklin,

80 Va., hereby for the sum of Five Hundred Dollars ($500.0
cash in hand paid by P. D. Camp to Morgan Lumber Co
pany. Said Morgan Lumber Company gives to P. D. Camp
Option until July 1st, 1913, to rent or lease the Saw Mill Plant of
Morgan Lumber Company, located near Jacksonville, Florida, fo
period of two (2) years at a rental of $1.00 per thousand feet o
basis of the lumber manufactured at the said mill. Lessor agree
to pay Lessee a minimum rental of $20,000.00 per year, rental p
able weekly.

If at the expiration of any twelve months from September 1
1913, Lessor desires to lease the mill for another two years he is
so advise Lessee in writing, which will give Lessee the same use
the mill for the said period.

P. D. Camp has option for two years from this date to purch
the fifty-one acres of land on which the Morgan Lumber Co
pany's mill is now situated for the sum of $75,000.00 plus inter
at 6% from this date. P. D. Camp also has option for two ye
from this date to purchase said mill plant complete for the sum
$125,000.00 plus interest at 6%, but whatever rent has been pa
up to date by the said Camp exercising the said option is to be appli
on the purchase price of said Mill.

If P. D. Camp should exercise his option to purchase Mill pla
and not the land, the said P. D. Camp is to have the right to u
the said land as long as desired for a Mill site by paying inter
monthly, at the rate of 6% on the valuation of $75,000.00 on t
said land, and, paying the taxes on said land.

P. D. Camp has option until September 1st, 1913, to rent t
Morgan Lumber Company's plant on a basis of $20,000.00 per ye
for five (5) years, rent payable weekly. Should P. D. Camp exerc
the option to rent the plant for five (5) years at $20,000.00 p
year, there is to be no accounting made of the quantity of lumb
manufactured.

Should P. D. Camp exercise any of these options, Morgan Lu
ber Company is to turn over the plant to the said P. D. Camp
September 1st, 1913, in good operating condition and the rent is
date from September 1st, 1913.

In addition to the rent as above outlined, said P. D. Camp is
keep the Mill insured for the benefit of the Morgan Lumb
81 Company in the sum of $120,000.00. Morgan Lumb
Company is to pay the taxes on the land on rental basis, h
if P. D. Camp purchases the property, the said Camp is to p
the taxes from the date of said purchase.

At the expiration of the lease or date of any of the foregoing c
tions, the property is to be returned to the owners, or the Morg
Lumber Company in as good condition as received, natural wear
cepted. It being understood that the plant is to be returned as
going proposition.

This lease does not preclude the Gress Manufacturing Compa
from the free use of a certain Dock and Storage space now bei
used by them for handling lumber and cross ties, nor does it p

clude the Morgan Lumber Company from disposing of Machinery and Scrap not necessary in the operation of the said Plant.

$500.00 to be used as a credit if any of these options closed.

In case mill is destroyed by fire with as much as 50,000,000 feet to saw Morgan Lbr. Co. agrees to replace plant or make satisfactory arrangements.

MORGAN LBR. CO. [SEAL.]
M. V. GRESS, *Prest.*
P. D. CAMP. [SEAL]."

Told Mr. Gress that the Crystal River Lumber Company owned a tract of timber, that he had an interest in it, and thought the company would convey the timber to him. Never did represent the number of feet on the *the* tract. Stated according to Brayten's estimate there might have been 140,000,000 feet, but made no representations that there were so many feet; only stated what sombody else said. He and Mr. Gress signed a preliminary contract. This was superseded by the contract sued on, which is the correct contract. The letter referred to is offered in evidence, and is as follows:

"Franklin, Va., July 23, 1913.

Mr. Morgan V. Gress, Jacksonville, Fla.

DEAR SIR: Subject to verification by September 1st, 1913, that we have One Hundred and Forty Million Feet of timber
82 on our "West tract," located on 42,000 acres of land in Levy County, Florida, I make you the following proposition: That a Company be formed at once having a capital of $450,000.00, of which I receive $325,000.00 for my timber, and you receive $125,000.00 for your Mill and all property located on your "Mill tract" of land. The new Company will have the option to purchase your land at any time within two years for $75,00-.00, in the meantime paying rental on a basis of six per cent on the valuation, for as long a time as the property is required for the purpose of operating a Saw mill.

This new Company to start operating at any time after October 1st, 1913, that market conditions are favorable.

Such money as is needed for working capital to be loaned by you and myself in proportion to our holdings and the New Company's notes given for the same.

Yours very truly,

P. D. CAMP.

P. D. C./heg.

I accept the above proposition.

M. V. GRESS. [SEAL]."

There were many letters passing between Gress and himself insisting upon compliance with the contract. He could not say how many. His reason for not complying was that it was found to be suicidal to all parties concerned to enter into the contract to man-

ufacture the timber, with the contract with the Coast Line Railroad. They would not sign the railroad contract. Mr. Gress insisted that they sign it, and he told him it would ruin them both if they signed that contract. He was willing for sometime, until lumber went down, to complete his part of the contract. Lumber went down so low and the railroad company was so arbitrary that he found that if they entered into the contract that he, Gress, would lose his mill, and they would lose their lumber, and for that reason and on account of his brother's health and the loss of his nephew they declined to go into it. Could not state positively about what time, but sometime in 1914—the latter part of 1914; that they were willing to carry out the contract provided that they could get a sat-
83 isfactory rate with the Coast Line. That they made the contract in August, 1913; that in December, 1913, he wrote Mr. Gress "What will you charge to release me on account of the contract?" That he wanted to live up to it if he could possibly do so; that he wanted to live up to his agreement, and if Mr. Gress had suffered any loss by this he would pay him a fair compensation. By going into it they would have lost all their property. That in December, five months after the contract was made, he was ready to cancel it and was unwilling to complete it for the reasons that he had stated. If he had caused Mr. Gress any damage he was willing to pay fair compensation. Another reason why that the arbitrary position of the Coast Line Railroad was such that neither he nor Gress could have lived under it; that he supposed the railroad charged everybody the same rate, but that the rate of $15.00 a car of 50,000 pounds offered them was considerably less than the regular rate, but to get that rate they required us to give thirty cars in every load every day in the year except Sundays; that the contract would show it. That when Mr. Gress was in Franklin he told him substantially that he was not going to carry out the contract, that he thought it would be best for each one to take his own property, and not to make any conveyance to the other. That was their understanding; Mr. Gress stated that he was willing for the contract to stay as it was then until lumber was $20.00 per thousand f. a. s.; that he would not say positively whether he had negotiated for the sale of the property at that time, or not; that from his correspondence in May, 1915, he saw that he offered to sell this property, and he told him that was the first time they ever offered it at $350,000, they to pay for the extension. That he did not remember whether or not they had been trying to find some one who would buy it prior to that time, but that his correspondence would show. That the reason that the corporation was not formed Mr. Gress was to have the charter drawn up. Mr. Gress drew up the charter, and it was not in accordance with their understanding. Mr. Gress never deeded his property, never made any deed to this property and demanded that the new company should take the deed over; there was never a deed by anybody. He supposed that Mr. Gress was ready to carry out his part of the contract; he didn't know; he said that he would do it, that he had already stated why he didn't carry out his part of the contract.

84 And this being all the evidence introduced by the defendants, the plaintiff, to maintain the issues upon his part, introduced the following evidence in rebuttal:

E. P. RENTZ, being duly sworn, testified as follows:

He lives at Tarboro, Florida, and has been engaged in the sawmill business 35 years; owned and operated sawmill, cutting from 50,000 to 100,000 feet per day, not engaged in the sawmill business now; is logging in Florida; is a brother of George Rentz. He is conducting the logging operations for the George Rentz Lumber Company. The logs are going to the mill which was the Morgan Lumber Company's plant which was burned and rebuilt. Had examined the timber known as the Levy County Lumber Company timber in September or August, 1915, accompanied by John Upchurch and John Macon; was making an examination with a view to making a price on the property; did not go over it thoroughly, but in a general way; subsequently got a price from P. D. Camp of $400,000. The lease at that time had been extended. Saw Mr. Camp at Franklin, Virginia; Mr. Upchurch was with him; did not buy at that price because he could not raise the money; was willing to buy. Could not say how much of the timber was under 14 inches at the stump; did not examine for that purpose. The merchantable sawmill timber he spoke of was timber measuring 12 inches and above at the stump, 18 inches from the ground, and then there were about 150,000,000 feet of pine and cypress, 135,000,000 feet of pine and 15,000,000 feet of cypress; yellow pine stumpage on the 31st of December, 1914, was worth $3.00 per thousand. Cypress of the grade and quality he saw was worth from $3.00 to $5.00 per thousand. The 150,000,000 feet he saw did not include down or dead timber suitable for cross ties. This would amount to about 10,000,000 or 15,000,000 feet. Ties sold from 10 to 12 cents apiece December, 1914. An appreciable proportion of the cypress timber was fine large timber. He considered this tract of timber the best big body of timber that he had seen in the state on account of the size of it and the quantity on the land. This timber grew right on the Gulf Stream and on the little creek that made into the Gulf Stream, and this made it very fine timber. That he had been in Florida eight or ten years sawmilling, and that during that time, the price of stumpage had been going up,

85 and specially of good timber; that the average price eight or ten years ago was from $1.50 to $2.50, owing altogether to the quality and location. That the tendency has been gradually upward, and there had not been perfect harmony between the stump market and manufacturing lumber. That he has had experience in selling manufacturing lumber, and had very little to do with the price of stumpage—that the price of stumpage had gone up steadily, regardless of size, while lumber was low. That the timber had been turpentined some when he saw it in September, 1915; it was still being worked. It had been worked several years. Saw evidence of fire through the timber in the spring of that year. If the land had been raked to prevent fire he did not see it. That he was a brother

of Mr. Rentz who leased the plant from Mr. Grees; that he saw the mill after it was burned—was there twice; it burned within sixty days after his brother started operation. That he had operated a mill at Fort McCue, Silver Springs, and one in De Soto County, they were large mills; that the average acreage of yellow pine stumpage bought in Florida in the last ten years was more than 100,000 acres; that the witness had examined the sawmill plant after the fire; that his recollection was that the planing mill was not damaged at all, and some parts of the dock was not damaged, and some parts of the approaches to the planing mill were left intact; the dry kilns were all right. All of the sawmill was burned except the boiler plant, and the boilers were badly damaged. The sawmill was all destroyed; that the boiler plant was down; that he did not know whether the boilers were damaged, or not, because he did not examine the flue and the boiler shed. He simply looked the boiler over, and did not go in to make an examination, and could not judge from the outside appearances as to the condition of the boiler; that he would hate to give $18,000 for a new boiler; that there was nothing in his knowledge to justify such a price as was put upon this by the witness Williams; that it was a pretty hard thing to say, but that he thought it would cost $125,000 to rebuild the mill—planing mill and everything; that the price of the mill, when he went there after the fire, was the price of junk; that he would have to stop and figure the machine and piling and the cost of lumber, and so much per thousand for working the lumber—it was hard to get; that he could not say what was the value of the plant after the fire; would estimate the shanties at $200.00 apiece; that he would consider the mill
86 cut loose from its timber supply, as being worth no more than junk; that he could only sell it for scrap; that he knew of a mill in the neighborhood that cost $125,000 which, with the timber supply cut loose from it, brought only $5,000. He stated that it was difficult to supply a mill like this with lumber at existing freight rates; that the lumber in the far southern part of the state is of a different character and is a sort of scrub timber, and hard to get out. The timber that he is logging is 150 miles away, and is nothing like as good as the Levy County Lumber, and that his brother is paying $3.00 for pine and $3.50 for cypress, and in some sections $5.00 a thousand for cypress, and that this timber is not as good as the Levy County lumber.

On cross examination he stated that he received a letter after he went home from Mr. Camp, in Franklin; that the copy of the letter shown him, he thinks from memory, is a correct copy. Letter is offered in evidence dated September 29, 1915, and is as follows:

"Copy.

Franklin, Va., September 29, 1915.

Messrs. E. P. Rentz and J. P. Upchurch, Ocala, Florida.

GENTLEMEN: Confirming conversation I had with you, we will sell you our property known as the "West" property and what other

timber we own in Levy County, Florida, our right, title and interest to all of this timber, as today, for $375,000.00 cash and you take care of the three $5,000.00 notes due the Florida Syndicate, Limited; or

We will sell for $385,000.00 and you take care of the three notes for $5,000.00 each, and $75,000.00 cash. If you accept the last proposition, you are to pay us $5,000.00 by the 20th of October and we will give you until the first of December, 1915, to make the balance of the cash payment, and no interest is to be charged on the cash payment. All papers are to be dated December 15th, 1915, and you are to pay $6,000.00 a month, and the interest is to be paid semi-annually, and if you should cut the timber faster than 2,000,000 feet a month, then you are to make up a schedule and furnish us at the end of every six months, and then pay us at the rate of
87 $3.00 per thousand feet for all timber over and above the 2,000,000 feet per month, and that money is to apply on the last maturing notes.

We will give you until the 16th of October, 1915, to accept or reject either of the above propositions. It is understood that we are to convey you our right, title and interest in this timber. If there are any details in connections with this deal, they will have to be agreed upon. The $75,000.00 referred to in the second proposition is the cash payment, and is a part of the $385,000.00.

Yours very truly,

CRYSTAL RIVER LUMBER COMPANY,
By P. D. CAMP, *President.*

P. D. C./B."

E. M. GREENE, being duly sworn, testified as follows:

That he lives in Florida; is engaged in the lumber business for forty years, a good many years logging, and during the past fifteen years has been estimating and buying and selling timber; has been in the employ of Mr. Gress, but not now employed by him; left him in August, 1914; that he represented Mr. Gress in examining the timber belonging to Camp; that he was there in June, 1913, again in August, 1913, and examined the timber at the request of Mr. Gress, understanding Mr. Gress was going to trade with Mr. Camp; that his estimate of the timber was that it would cut for the sawmill 126,000 feet. Did not estimate the cypress carefully; did not estimate the timber considered as cross tie timber; saw the cypress and cross tie timber, however; thought there were 300,000 cross ties and probably more; that the prevailing price for stumpage ties was 10 to 12 cents per tie; did not estimate the cypress; would say it was between 10,000,000 and 15,000,000 feet; hardly knew the price of cypress. Estimated the fair stumpage value of the timber was $3.00 a thousand; thought the stumpage in December, 1914, had increased 25 to 50 cents a thousand. The demand for cross tie timber was greater. The price of stumpage had been affected by the price of manufactured lumber; that the price of stumpage had been as low as $1.50 per thousand; that in 1913 the stumpage in question

was worth $3.00; that during the next fifteen months there
88 was an increase of from 25 to 50 cents per thousand; that he had never known the price of stumpage to drop; that he based his opinion as to the value on the increase in the price of timber; that he raised the price on account of this being very fine timber, which would make it more valuable for lumber than small timber. Mr. Dunning, who testified, was with me, representing the Camps, at the time I examined the property. He estimated that it was 170,000,000 feet of merchantable sawed timber. He did not say that; that is what he meant.

Letter initialed P. D. C., signed Levy County Lumber Company, dated August 25, 1913; letter from Gress to Mr. Camp, dated August 27, 1913; letter from Crystal River Lumber Company to Gress, dated November 18, 1913, offered in evidence and are as follows:

"8-25-13.

Mr. Morgan V. Gress, Jacksonville, Fla.

DEAR SIR: We are in receipt of yours of recent date in regard to the charter for the Levy County Lumber Company, and I note that you name yourself as president, Mr. Fish as Secretary-Treasurer and myself as vice-president. Now I would suggest a change in this, that would make Mr. P. R. Camp president, and make you vice-president and treasurer, and Mr. Fish Secretary, or Secretary-Treasurer; whichever you prefer, and a board of directors consisting of the above named officers Mr. J. M. Camp and myself, and whoever is treasurer, we would want them to give bond, so that they will be able to handle anything that comes in their hands.

Yours very truly,

LEVY COUNTY LUMBER COMPANY,

By —— ——.

P. D. C. K."

"8-27-13.

Mr. P. D. Camp, Franklin, Va.

DEAR SIR: I am very glad indeed that the matter of selling stock has now been thoroughly explained to you, and that same is
89 satisfactory. I am perfectly willing to give you the refusal of my stock before sold to any one else. Please understand that you will get this. I see no reason why the stock should be sold, except as a whole proposition.

Now, with regard to the organization. It does look like we are getting into a number of little things which need explanation. I told our Attorney here to apply for a Charter in your name, Mr. Fish's name and my own name, without giving him any information as to who would be President, or any other officials, simply using these names for the purpose of organization. Mr. Carson therefore took it upon himself to elect all of these officers. However, these officers only act until the first meeting in October, when actual officers are elected for the year. I therefore suggest that you sign the

paper just as it is, and mail same back to him, and at the first organization meeting in October we can agree upon officers. In no event would Mr. Fish or myself wish to be an officer of the Company, for reasons which I will explain to you in person at our next meeting. I thought that either yourself or Mr. P. R. Camp would be President, and George Camp, Secretary & Treasurer, in case he came here, and if not some other party who would actually be on the job.

Have you decided anything about whether or not the property is to be operated as the Camp Mfg. Company?

Very truly yours,

MORGAN V. GRESS."

"Franklin, Va., 11/18/13.

Mr. Morgan V. Gress, Jacksonville, Fla.

DEAR SIR: I am in receipt of your letter of the 13th instant in regard to getting the extension, and as I wrote you I have instructed Mr. Dunning to go there Monday (17th) and get the extension, and I suppose was there on that day to get it.

I hate to disagree with my partner, but I think this was the thing to do, as this will give us plenty of time, and we can lease the
90 turpentine privileges and get our money back, and with the wood and all we will have no trouble in getting our money.

Yours very truly,

CRYSTAL RIVER LUMBER COMPANY
P. D. CAMP, *President.*"

P. D. C. K.

This being all of the evidence, counsel for the defendants thereupon moved the court to direct the jury to find a verdict for the defendants, which motion the court overruled and the defendants, then and there, excepted, and tender this their bill of exception No. 3, and pray that the same may be signed, sealed and made a part of the record, which is accordingly done.

EDMUND WADDILL, JR., [SEAL.]
U. S. Dist. Judge.

Norfolk, Va., February 15th, 1917.

Defendants' Bill of Exceptions No. 4.

Filed February 15, 1917.

Be it remembered that upon the trial of this case, and after the plaintiff, Gress, had testified as set out in Bill of Exceptions No. 3 hereby referred to and made a part hereof, said plaintiff, Gress, testifying as a witness for the plaintiff was asked by his counsel, the following questions and made the following answers:

(See p. 15 of Notes of Evidence.)

"Q. Between the time the contract was made and the time it was finally breached, in what condition was the mill, was it operated?

A. It was not operated. Insurance was carried on it, and watch men were there night and day. Certain repairs were commenced in September, 1913, but were not completed.

Q. Mr. Gress, how long after the contract was finally breached i December, 1914, before the mill ever operated until January, 191 January of this year.

(And Continuing, See p. 16, Notes of Evidence.)

91 Q. Mr. Gress, what, in your opinion, was the value of th mill plant if you had disconnected the saw mill proper from it, and if the Camps had disconnected the standing timb part?

A. The only value was the value of machinery for scrap.

Q. How much was that, in your opinion?

A. Approximately $25,000.00."

(And Continuing, See p. 19, Notes of Evidence.)

"Q. When Mr. Camp declined to carry out this contract and for a new corporation, what was your opinion of the value of the sa mill property?

A. Only the price of the machinery therein for junk to be so for $25,000.00.

To which questions and answers defendants, by counsel, objecte on the ground that the evidence introduced shows that the mill pla in question belonged to the Morgan Lumber Company, and not the plaintiff, any evidence of depreciation in value of the mill pla was improper and not relevant for the reason that plaintiff could n claim damages for the depreciation in value of property belonging another (see objections stated on page — of the record and by agre ment made to apply to all subsequent evidence of the same cha acter.) The objections of defendants to each of which questions a answers were overruled by the court, and the questions and answe and each of them were admitted in evidence, to which action of t court, in admitting the questions and answers and each of them evidence and in admitting other evidence of the same character ov the objections of defendants, defendants, by counsel, then and the excepted and tender their bill of exceptions No. 4, which they pr may be signed, sealed and made a part of the record, which is a cordingly done, this 15th day of February, 1917.

EDMUND WADDILL, JR., [SEAL.]
U. S. Dist. Judge.

Defendants' Bill of Exception No. 5.

Filed February 15, 1917.

Be it remembered that upon the trial of this case, after t
92 plaintiff and defendants, to maintain the issues on their par respectively, introduced the evidence set forth in bill of e ception No. 3, hereby referred to and made a part hereof and pa

ticularly the evidence set forth in bill of exception No. 4, and other similar evidence tending to show the depreciation of the mill plant in question in this suit between the date it contracted and the date of its alleged breach, which evidence tending to show the preciation of the said mill plant was admitted by the Court over the objection and subject to the exception of defendants, counsel for defendants moved the Court to strike out all of the evidence tending to show depreciation of the said mill plant, particularly including that set out in bill of exception No. 4, as being irrelevant, immaterial and improper, which action of the court in accounting defendants' motion to strike out the said evidence and each part of it, the defendants, at the time, excepted and tender their bill of exception No. 5, which they pray may be signed, sealed and made a part of the record, which is accordingly done, this 15th day of February, 1917.

EDMUND WADDILL, Jr., [SEAL.]
U. S. District Judge.

Defendants' Bill of Exception No. 6.

Filed February 16, 1917.

Be it remembered that on the trial of this cause, after the plaintiff and defendants had introduced the evidence to maintain the issues on their respective parts, which evidence is fully set out in Bill of Exceptions No. 3, and is here referred to and made a part of this Bill of Exceptions, the defendants requested the Court to grant the following instructions:

The Court instructs the jury that if they believe from the evidence that the plaintiff does not own the mill plant situated in Jacksonville, mentioned in the contract in this suit, but that the legal title thereto is, and has been since the date of said contract, in another, then the plaintiff is not entitled to recover for any depreciation on the said mill plant, or for rent thereon, or for any insurance premium for insurance thereon.

The Court instructs the jury that under the contract, for the breach of which this suit is brought, the plaintiff was to ac-
93 cept in exchange for his property 5/18 of the stock of the corporation to be organized to take over the property, and if they believe the contract subsequently broken by defendants, then the measure of his damage for such breach is the difference between the value of said 5/18 on the date of the contract by the defendants if such corporation had been organized and the properties conveyed to it in accordance with the contract.

To which the plaintiff objected; which objection the Court sustained and refused to grant said instructions; to which action of the Court in refusing to grant said instructions the defendants excepted, and tender this their Bill of Exceptions No. 6, which they pray may be signed, sealed and made a part of the record, which is accordingly done this 15th day of February, 1917.

EDMUND WADDILL, Jr., [SEAL.]
U. S. District Judge.

Defendant's Bill of Exception No. 7.

Filed February 15, 1917.

Be it remembered that on the trial of this cause, after the plaintiff and defendants had introduced the evidence to maintain the issue on their respective parts, which evidence is fully set out in the Bill of Exceptions No. 2, and is expressly here referred to and made a part of this Bill of Exceptions, the plaintiff requested the Court to grant the following instructions:

The Court instructs the jury that this action is brought by the plaintiff to recover damages of the defendants for breach of contract, and that the amount of damages claimed is $137,908.34. The making of the contract is admitted. If the jury believe from the evidence that the plaintiff, Gress, was willing and able at all times after the making of the contract to perform the same as to the matters and things therein contained, which he contracted to do, and if you further believe from the evidence that the defendants, on or about the day or dates named in the declaration, refused to perform the contract according to its terms, then the defendants are liable to the plaintiff for the breach thereof, and if you find that the plaintiff has sustained damages by reason of said breach, you shall ascertain the same as follows:

94 1.

You will first determine from the evidence what was the fair market value on August 18, 1913, of the properties proposed to be contributed by the plaintiff, Morgan V. Gress, to Levy County Lumber Company, in exchange for his portion of the capital stock provided for in the contract. You will then ascertain from the evidence what was the fair market value of these properties on the date when it is alleged that the contract was breached, and if you find that there was a depreciation in the value of these properties between the dates named, and that the plaintiff, Morgan V. Gress, was owner of the Morgan Lumber Company, which held the titles to these properties, and that the said Company was at all times willing and ready to carry out the contract as made by Gress, and to convey said properties as contracted for by him, the difference in the amounts thus found will be one of the elements of damages recoverable by the plaintiff.

2.

You will inquire from the evidence the amount at which on August 18, 1913, the timber and timber interests described in the contract sued on, as being located in Levy County, Florida, and belonging to the defendants was conveyed to the proposed corporation. You will then inquire what was the fair market value of the timber and timber interests just referred to on the date of the alleged breach

of the contract by the defendants, and if you find that on the date set forward in the United and timber interests in Levy County, Florida, belonging to the defendants and proposed to be conveyed to the Levy County Lumber Company were worth an amount in excess of the amount at which it was conveyed, then 7/18 of the difference between said first amount and the value of the said timber rights on the date of the alleged breach is the amount which the plaintiff is entitled to recover of the defendants, less such amount as shall equal 7/18 of the cost of extension for five years' additional time in which to cut the said timber including interest.

3.

The Court instructs you that one of the material provisions of the contract sued on provided for the organization of a corporation, to be known as Levy County Lumber Company, and the assembling into ownership of that corporation of the saw mill plant and leasehold interest connected therewith, described in the declaration, and in proof submitted, as well as the conveyance to the corporation of the timber and timber interests in Levy County, Florida, described in the contract sued on as having been owned by the defendants. It is insisted by the plaintiff that he was ready and willing and able to perform and to procure performance by the Morgan Lumber Company of the plaintiff's obligations in this respect under the contract, and that the defendants failed and refused to perform this particular provision of the contract. If you find this contention of the plaintiff to be supported by the proof to your satisfaction, and by a preponderance of the evidence the Court instructs you that this will amount to such a breach of the contract sued on as would entitle the plaintiff to recover damages resulting directly from such failure on the part of the defendants to perform that provision of the contract.

The Court further instructs you that there is no controversy between the parties under the evidence as submitted as to just when the Levy County Lumber Company when organized should enter actively into the logging and manufacture of the timber in question.

4.

The Court instructs you that the plaintiff is not entitled to recover possible profits from the operations of the Levy County Lumber Company, the corporation which was never organized, nor are the defendants permitted to set off against damages otherwise satisfactorily shown to have been sustained by the plaintiff, any speculative or possible losses which might have been suffered by the plaintiff, if said corporation had been organized and operated.

5.

The Court instructs the jury that if you believe from the evidence that the defendants breached the contract sued on and that the

plaintiff incurred damages thereby, that you should allow
in the plaintiff as an element of his damages the expense
it was incurred for caring for and maintaining his mill prop
erty to December 31st, 1914, less the expenses incurred by defendant
for caring for and maintaining their timber property for the same
time.

To the giving of which instructions by the Court the defendants
by counsel, objected, and assign the following objections to the giving
thereof.

(1) The first instruction directed the jury to take into considera
tion the fair market value of the plaintiff's properties, that is, th
mill and plant, on the date it was alleged that the contract was mad
and to take into consideration the value of the properties, if ther
had been any depreciation, as of the date when the contract wa
breached, and that the plaintiff was entitled to recover the difference
if any, between these two values, thus allowing the jury to find fo
the plaintiff for the depreciating of the mill and plant which evi
dence showed belonged to the Morgan Lumber Company and neve
belonged to the plaintiff.

(2) The fifth instruction directed the jury to allow the plaintiff
as an element of its damages, the expenses, if any, incurred for caring
and maintaining his mill property to December 31st, 1914, when
the evidence introduced on behalf of the plaintiff showed that he
never owned this plant, but that the same had been, and still was the
property of the Morgan Lumber Company.

But the Court overruled the objections of the defendants to said
instructions as heretofore set forth, and granted the same, to which
action of the Court the defendants then and there excepted, and
tender this their Bill of Exceptions No. 7, which they pray may be
signed, sealed and made a part of the record, which is accordingly
done this 15th day of February, 1917.

EDMUND WADDILL, JR., [SEAL.]
U. S. District Judge.

Defendants' Bill of Exceptions No. 8.

Filed February 15, 1917.

Be it remembered that on the trial of this cause, after all the
evidence had been introduced on behalf of the plaintiff and
97 the defendants to maintain the issues on their respective parts
all of which is set out in Bill of Exceptions No. 3, which is
herein referred to and expressly made a part of this Bill of Excep
tions, the Court instructed the jury as follows:

The Court instructs the jury that this action is brought by the
plaintiff to recover damages of the defendants for breach of con
tract, and that the amount of damages claimed is $157,808.34. The
making of the contract is admitted. If the jury believe from the
evidence that the plaintiff, Gress, was willing and able at all time
after the making of the contract to perform the same as to the

matters and things therein contained, which he contracted to do, and if you further believe from the evidence that defendants, on or about the day or dates named in the declaration, refused to perform the contract according to its terms, then the defendants are liable to the plaintiff for breach thereof, and if you find that the plaintiff has sustained damages by reason of said breach, you shall ascertain the same as follows:

1.

You will first determine from the evidence what was the fair market value on August 18, 1913, of the properties proposed to be contributed by the plaintiff, Morgan V. Gress, to Levy County Lumber Company in exchange for his portion of the capital stock provided for in the contract. You will then ascertain from the evidence what was the fair market value of these properties on the date when it is alleged that the contract was breached, and if you find that there was a depreciation in the value of these properties between the dates named, and that the plaintiff, Morgan V. Gress, was the owner of all of the stock of the Morgan Lumber Company, which held the titles to these properties, and that said Company was at all times willing and ready to carry out the contract as made by said Gress, and to convey said properties as contracted for by him, the difference in the amounts thus found will be one of the elements of damages recoverable by the plaintiff.

2.

You will inquire from the evidence the amount at which on August 18, 1913, the timber and timber interests described
98 in the contract sued on, as being located in Levy County, Florida, and belonging to the defendants was to be conveyed to the proposed corporation. You will then inquire what was the fair market value of the timber and the timber interests just referred to on the date of the alleged breach of the contract by the defendants, and if you find that on the date last referred to the timber and timber interests in Levy County, Florida, belonging to the defendants and proposed to be conveyed to the Levy County Lumber Company were worth an amount in excess of the amount at which it was to be conveyed, then 5/18 of the difference between said first amount and the value of the said timber rights on the date of the alleged breach is the amount which the plaintiff is entitled to recover of the defendants, less such amount as shall equal 5/18 of the cost of extension for five years' additional time in which to cut the said timber including interest.

3.

The Court instructs you that one of the material provisions of the contract sued on provided for the organization of a corporation to be known as the Levy County Lumber Company, and the

assembling into the ownership of that corporation of the saw mi
plant and leasehold interest connected therewith, described in th
declaration, and in the proof submitted, as well as the conveyanc
to that corporation of the timber and timber interests in Lev
County, Florida, described in the contract sued on as having bee
owned by the defendants. It is insisted by the plaintiff that he w
ready and willing and able to perform and procure performanc
by the Morgan Lumber Company of the plaintiff's obligations i
this respect under the contract, and that the defendants failed an
refused to perform this particular provision of the contract.
you find this contention of the plaintiff to be supporte
by the proof to your satisfaction, and by a preponderance of th
evidence, the Court instructs you that this will amount to suc
a breach of the contract sued on as would entitle the plaintiff
recover damages resulting directly *for* such failure on the part
the defendants to perform that provision of the contract.

The Court further instructs you that there is no controvers
between the parties under the evidence as submitted as
99 just when the Levy County Lumber Company when orga
ized should enter actively into the logging and manufactu
of the timber in question.

4.

The Court instructs you that the plaintiff is not entitled to recov
possible profits from the operations of the Levy County Lumb
Company, the corporation which was never organized, nor are th
defendants permitted to set off against damages otherwise satisfa
torily shown to have been sustained by the plaintiff, any speculati
or possible losses which might have been suffered by the plaintif
if said corporation had been organized and operated.

5.

The Court instructs the jury that if you believe from the evidenc
that the defendants breached the contract sued on and that th
plaintiff incurred damages thereby, that you should allow the plai
tiff as an element of his damages the expenses, if any, incurred f
caring for and maintaining his mill property to December 31s
1914, less the expenses incurred by the defendants for caring for an
maintaining their timber property for the same time.

6.

The Court istructs the jury that in order for the plaintiff to r
cover in this case, he must show, not only that the defendan
failed to carry out their contract, but that such failure caused th
plaintiff to show by a preponderance of the evidence and wit
reasonable certainty, the actual damage he has sustained, and
the jury believe from the evidence that the plaintiff has not suffere

any damage or loss by the failure of the defendants to carry out the said contract, then they should find for the defendants.

And thereupon, after argument by counsel, the jury returned a verdict in the following words and figures:

"On the issue joined, we, the jury, find for the plaintiff in the sum of $31,361.10."

And thereupon the defendants moved the Court to set
100 aside the verdict and grant them a new trial, on the ground that the Court had erred in the admission of testimony, in the giving of certain instructions on behalf of the plaintiff, and in the refusal to give certain instruction on behalf of the defendants, and because the verdict is contrary to the law and the evidence, which motion the Court overrules:

To which action of the Court in overruling their motion to set aside the verdict and grant them a new trial, the defendants excepted, and tender this their Bill of Exceptions No. 8, which they pray be signed, sealed and made a part of the record, which is accordingly done this the 15th day of February, 1917.

EDMUND WADDILL, JR., [SEAL.]
U. S. District Judge.

Assignments of Error.

Filed February 15, 1917.

On this the 15th day of February, 1917, the defendants, P. D. Camp, P. R. Camp and John M. Camp, come and say that the judgment entered against them on the 23rd day of December, 1916, by the District Court of the United States for the Eastern District of Virginia, at Norfolk, is erroneous, and the defendants make the following assignments of error to the rulings of the Court upon the trial of this case, to-wit:

(1) The Court erred in striking out, on motion of the plaintiff, the plea of abatement of the defendant, P. D. Camp and P. R. Camp.

(2) The Court erred in striking out, on motion of the plaintiff, the plea in abatement of defendant, John M. Camp.

(3) The Court erred in admitting evidence tending to show the depreciation or decrease in value of the mill plant near Jacksonville, Florida, mentioned and described in the contract upon which this case is based, after it had been proved that the said mill plant did not, and never had belonged to the plaintiff in this case, but belonged to the Morgan Lumber Company, a Florida corporation, to whom it belonged at the time of
101 making of the contract sued on, and from that time up to and including the date of the trial of this cause.

(4) The Court erred in refusing to direct a verdict for the defendants, on the defendants' motion at the conclusion of the plaintiff's testimony in the case.

(5) The Court erred in refusing to direct a verdict for the

defendants, on the defendants' motion at the conclusion of all the testimony in the case.

(6) The Court erred in instructing the jury as follows: The Court instructs the jury that this action is brought by the plaintiff to recover damages of the defendants for breach of contract, and that the amount of damages claimed is $157,808.34. The making of the contract is admitted. If the jury believe from the evidence that the plaintiff, Gress, was willing and able at all times after the making of the contract to perform the same as to the matters and things therein contained, which he contracted to do, and if you further believe from the evidence that the defendants, on or about the day or dates named in declaration, refused to perform the contract according to its terms, then the defendants are liable to the plaintiff for the breach thereof, and if you find that the plaintiff has sustained damages by reason of said breach, you shall ascertain the same as follows:

1. You will first determine from the evidence what was the fair market value on August 18, 1913, of the properties proposed to be contributed by the plaintiff, Morgan V. Gress, to Levy County Lumber Company in exchange for his portion of the capital stock provided for in the contract. You will then ascertain from the evidence what was the fair market value of these properties on the date when it is alleged that the contract was breached, and if you find that there was a depreciation in the value of these properties between the dates named, and that the plaintiff, Morgan V. Gress, was the owner of all of the stock of Morgan Lumber Company, which held the titles to these properties, and that said Company was at all times willing and ready to carry out the contract as made by said Gress, and to convey said properties as contracted for by him, the difference in the amounts thus found will be of
102 the elements of damages recoverable by the plaintiff.

2. You will inquire from the evidence the amount at which on August 18, 1913, the timber and interests described in the contract sued on, as being located in Levy County, Florida, and belonging to the defendants was to be conveyed to the proposed corporation. You will then inquire what was the fair market value of the timber and the timber interests just referred to on the date of the alleged breach of the contract by the defendants, and if you find that on the date last referred to the timber and the timber interests in Levy County, Florida, belonging to the defendants and proposed to be conveyed to the Levy County Lumber Company were worth an amount in excess of the amount at which it was to be conveyed, then 5/18 of the difference between said first amount and the value of the said timber rights on the date of the alleged breach is the amount which the plaintiff is entitled to recover of the defendants, less such amount as shall equal 5/18 of the cost of extension for five years' additional time in which to cut the said timber including interest.

3. The Court instructs you that one of the material provisions of the contract sued on provided for the organization of a Corporation, to be known as Levy County Lumber Company, and the assembling

into ownership of that corporation, of the saw mill plant and leasehold interest connected therewith, described in the declaration, and in the proof submitted, as well as the conveyance to that corporation of the timber and timber interests in Levy County, Florida, described in contract sued on as having been owned by the defendants. It is insisted by the plaintiff that he was ready and willing and able to perform and to procure preference under the contract, and that the defendants failed and refused to perform this particular provision of the contract. If you find this contention of the plaintiff to be supported by the proof to your satisfaction, and by preponderance of the evidence, the court instructs you that this will amount to such a breach of the contract sued on as would entitle the plaintiff to recover damages resulting directly from such failure on the part of the defendants to perform that provision of the contract.

103 The court further instructs you that *the* there is no controversy between the parties under the evidence as submitted as to just when the Levy County Lumber Company when organized should enter actively into the logging and manufacture of the timber in question.

4. The court instructs you that the plaintiff is not entitled to recover possible profits from the operations of the Levy County Lumber Company, the corporation which was never organized, nor are the defendants permitted to set off against damages otherwise satisfactorily shown to have been sustained by the plaintiff, any speculative or possible losses which might have been suffered by the plaintiff, if said corporation had been organized and operated.

5. The court instructs the jury that if you believe from the evidence that the defendants breached the contract sued on and that the plaintiff incurred damages thereby, that you should allow the plaintiff as an element of his damages the expenses, if any, incurred for caring for and maintaining his mill property to December 31st, 1914, less expenses incurred by the defendants for caring for and maintaining their timber property for the same time.

7. The court erred in refusing to give the following instructions offered by the defendants:

A.

The court instructs the jury that if they believe from the evidence that the plaintiff does not own the mill plant situated in Jacksonville mentioned in the contract in this suit, but that the legal title thereto is, and has been since the date of the said contract, in another, then the plaintiff is not entitled to recover for any depreciation on the said mill plant, or for rent thereon, or for any insurance premium for insurance thereon.

B.

The court instructs the jury under the contract, for the breach of which this suit is brought, the plaintiff was to accept in ex-

104 change for his property 5/18 of the stock of the corporation to be organized to take over the property, and if they believe the contract subsequently broken by defendants, then the measure of his damage for such breach is the difference between the value of said 5/18 on the date of the contract and its value at the date of the breach of such contract by the defendants if such corporation had been organized and the properties conveyed to it in accordance with the contract.

(8) The court erred in overruling the defendants' motion to set aside the verdict as contrary to the law and the evidence, and award it a new trial, on account of the various errors committed by the Court during the trial of the cause hereinbefore specifically referred to.

Wherefore, The defendants pray that the judgment entered herein against them may be reversed.

P. D. CAMP,
P. R. CAMP,
JOHN M. CAMP,
By WILLCOX, COOKE & WILLCOX,
PEATROSS & SAVAGE,
Their Attorneys.

Præcipe as to Record on Appeal.

Filed March 14, 1917.

To the Clerk of the said Court:

The plaintiffs in error hereby indicate the following portions of the record to be incorporated in the transcript for the appeal now being taken by them.

Declaration.
Defendants' Pleas.
Plaintiff's Motion to Strike out Pleas.
Orders rejecting Defendants' Pleas.
Bills of Exceptions Nos. 1 and 2.
Orders on Trial; Court's Charge.
Bills of Exceptions, Nos. 3, 4, 5, 6, 7 & 8.
105 Petition for Writ of Error, Assignments of Error, and Order allowing Writ of Error.
Supersedeas and Appeal Bond.

P. D. CAMP,
P. R. CAMP, AND
JOHN M. CAMP,
By WILLCOX, COOKE & WILLCOX,
Their Counsel.
PEATROSS & SAVAGE.

Service accepted 14th day of March, 1917.
D. LAWRENCE GRONER,
Counsel for Plaintiff.

Stipulation of Counsel as to Printing of Record.

Filed March 14th, 1917.

It is hereby stipulated that the Clerk of this Court shall make up record in the above style and entitled case, and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, and that it be printed under the supervision of the Clerk of that Court in accordance with Rule 23.

WILLCOX, COOKE & WILLCOX,
PEATROSS & SAVAGE,
Counsel for P. D. Camp, P. R. Camp & J. M. Camp.
D. LAWRENCE GRONER,
Counsel for Plaintiff Below.

Memorandum of Original Papers Accompanying Transcript of Record.

(1) Petition for Writ of Error, filed 15th day of February, 1917.
(2) Writ of Error granted the 15th day of February, 1917.
(3) Writ of Error issued the 9th day of March, 1917.
106 (4) Copy of Writ of Error lodged for adverse party the 12th day of March, 1917.
(5) Supersedeas and Appeal Bond filed March 9th, 1917: Penalty $35,000. Obligators, P. D. Camp, principal, and J. L. Camp and C. C. Vaughan, Jr., sureties. Conditioned for costs and damages.
(6) Citation dated March 9th, 1917. Service accepted March 12th, 1917.

Certificate of Clerk.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, Joseph P. Brady, Clerk of the United States District Court for the Eastern District of Virginia, do hereby certify that the foregoing is a full and true transcript of the record of the proceedings and judgment of the said Court, as stipulated by counsels of record, in the therein entitled case.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, at Norfolk, in said district, this 3rd day of April, 1917.

[SEAL OF COURT.] JOSEPH P. BRADY, *Clerk,*
By D. ARTHUR KELSEY,
Deputy Clerk.

107-108 *Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.*

No. 1527.

P. D. CAMP, P. R. CAMP, and JOHN M. CAMP, Plaintiffs in Error,

vs.

MORGAN V. GRESS, Defendant in Error.

Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk.

April 11, 1917, the transcript of record is filed and the cause docketed.

Same day, the original petition for writ of error, order allowing writ of error, writ of error, writ of error bond, and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of T. D. Savage is entered for the Plaintiffs in Error.

April 17, 1917, the appearance of D. Lawrence Groner is entered for the Defendant in Error.

April 18, 1917, the appearance of Thomas H. Willcox is entered for the Plaintiffs in Error.

April 27, 1917, twenty-five copies of the printed record are filed.

July 5, 1917 (July Term 1917) cause came on to be heard before Pritchard, Knapp and Woods, Circuit Judges, and is argued by counsel and submitted.

109 *Opinion.*

Filed July 20, 1917.

Corrected Copy.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1527.

P. D. CAMP, P. R. CAMP, and JOHN M. CAMP, Plaintiffs in Error,

versus

MORGAN V. GRESS, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk.

(Argued July 5, 1917; Decided July 20, 1917.)

Before Pritchard, Knapp, and Woods, Circuit Judges.

T. D. Savage and Thomas H. Willcox (Willcox, Cooke & Willcox on brief) for plaintiffs in error, and William M. Toomer and D. Lawrence Groner for defendant in error.

Woods, *Circuit Judge:*

In this action for breach of contract the plaintiff recovered judgment for $31,361.10. The contract dated August 18, 1913, between M. V. Gress on the one part and P. D. Camp, P. R. Camp and John M. Camp jointly on the other, provided that charter should be obtained for a joint stock company to be organized by December 1, 1913, to be called the Levy County Lumber Company. The Camps were to convey to the corporation a large body of timber in Levy County, Florida, at a valuation of $325,000, and Gress, a saw mill plant in the city of Jacksonville, at a valuation of $125,000. The stock of the corporation was to be issued in the proportion of 13/18 to the Camps and 5/18 to Gress. On December 31, 1914, the contract was breached by the formal refusal of the Camps to carry it out. The grounds of the refusal, as expressed by P. D. Camp, were the failure of the health of his brothers, and the fall in the price of lumber making certain the operation of the projected business at a loss.

The damages claimed at the trial were the losses by Gress by reason of (1) a large increase in the value of the timber between the date of the contract and the breach, and (2) a large decrease in the value of the mill by reason of the lack of timber to saw. The claims were for a much larger amount than that found by the jury.

We consider first the point that the District Court should have sustained the pleas in abatement challenging the jurisdiction of the court. Gress is a resident of Florida. P. D. Camp and P. R. Camp are residents of the Eastern District of Virginia. John M. Camp is a resident of the Eastern District of North Carolina and accepted service of the summons in the Eastern District of Virginia. His contention is that he can be sued only in the district of his own residence or in the district of the residence of the plaintiff. The other defendants contend that since the obligation was joint and not several, the action cannot be maintained against them without making John M. Camp a party, that he cannot be sued in the Eastern District of Virginia, and that therefore the action should be dismissed as to all. These jurisdictional questions depend on the construction of Sections 50 and 51 of the Judicial Code taken in connection.

Section 50 provides:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district aforesaid, shall not constitute matter of abatement or objection to the suit."

Section 51 provides among other things:

"* * * No civil suit shall be brought in any district court against any person by any original process or proceedings in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The act of 1875 provided that even a single defendant might be sued either in the district of his residence or the district where he was found. Section 51 of the Judicial Code, taking the place of the corresponding section of the act of 1875, leaves out the provision that a defendant may be sued in the district in which he is found. Therefore, where there is only one defendant and the jurisdiction depends, as in this case, on diversity of citizenship alone, the suit must be brought in either the district of the residence of the defendant or of the plaintiff. Although the Judicial Code received great con-
112 sideration, the act of 1839 was reenacted as Section 50, and by it the provision is made as to an action against two or more defendants, one or more of them being neither inhabitants of nor found within the district in which the suit is brought and not voluntarily appearing, that the court may entertain jurisdiction without prejudice to the rights of the party not regularly served nor voluntarily appearing. The words "found in the district" left out of one section and retained in the other must have significance. If they have, the sections construed together must mean that for purposes of jurisdiction a single defendant must reside in the district in which the suit is brought, but where there are several defendants the court has jurisdiction of all if one or more are residents of the district and the others are found there. We find no controlling authority on the subject, but this construction, required as it seems to us by the letter of the statutes, is the more readily adopted because it facilitates the administration of justice, and obviates in a degree the necessity of a multiplicity of actions in different districts on the same cause of action.

There is no foundation for the argument that the defendant, John M. Camp, was not "found" in the Eastern District of Virginia. The pleas to the jurisdiction alleged only that he was not a resident of that district. The ground of the motion to strike out the pleas to the jurisdiction was that although not a resident he was found in the district. This averment of fact in the motion on which the court granted it was not controverted in the court below and cannot be drawn in question here. The pleas to the jurisdiction were properly overruled.

Even if the plea in abatement were good as to John M. Camp, it could not avail the other defendants. One of the evident purposes of the enactment of the statute of 1839, Section 50 of the Judicial Code, was to enable a plaintiff to sue one or more joint makers of a contract in the district of their residence when other joint
113 makers could not be brought in to the action because of their residence in another district. Clearwater v. Meredith, 21 How. 489; Barney v. Baltimore, 6 Wall. 280. If the court had had no jurisdiction of John M. Camp, the judgment as to him would be

a nullity not affecting the judgment rendered against the other defendants, Gray v. Stewart, 33 Grat. 351.

On the merits, the first position taken is that Gress, the plaintiff, could not recover damages for depreciation in the value of the saw mill plant because the title to the plant was in the Morgan Lumber Company and was never acquired by the plaintiff, although he was the owner of all the stock of the corporation. It is true, as has been decided in numberless cases, that an action for damages for breach of a contract made by a corporation must be brought in the name of the corporation itself, and cannot be maintained by the stockholders or even by one stockholder owning all the stock. But this contract was not made either nominally or actually by the Morgan Lumber Company or for its benefit. This being so, no action could be brought by the corporation for breach of the contract. The defendants knew that Gress was not the legal owner of the saw mill plant, for the ownership of the Morgan Lumber Company was recited in the contract. Gress undertook to procure the conveyance of the property direct to the Levy County Lumber Company. The defendants accepted this obligation on his part; and it is admitted that he was ready, willing and able to carry out his agreement at all times. He was prevented from having the conveyance made solely by the express refusal of the defendants to allow him to do so. The promise of the defendants was to Gress and he alone could allege against the defendants damages for its breach.

Looking through the substance of the matter, what was the practical result to Gress of the defendants' breach? The defendants after default sold the timber for a net price much greater than
114 $325,000. Gress was obviously entitled to receive his share of this net increase in price.

The depreciation in the value of the mill plant came about in this way. Gress owned in connection with his mill plant a large body of timber which he intended to saw. After contracting with the defendants, he sold this timber on the faith of the contract. The defendants knew of his sale before they breached the contract. They cannot escape liability for the loss to Gress growing out of a condition which they knew would result from their default. Had the new corporation been formed, the plaintiff would have put in the saw mill plant at a valuation of $125,000, for which he would have received the equivalent in stock of the new corporation. The necessary result to Gress of the breach therefore was the loss of the difference between the value of the stock which would have been issued to him in the new corporation and the value of the stock in the Morgan Lumber Company as diminished by reason of the breach of contract by the defendants. This difference in value of stock was made by two facts, (1) the increase in the value of the timber retained by the defendants, and (2) the decrease in the value of the plant to be put in by Gress. The stock which would have been issued to him in the new corporation was worth 5/18 of the value of the timber to be contributed by the defendants and of the saw mill plant which the plaintiff was to contribute. There had been an increment in the value of

the timber at the date of the breach and the plaintiff was entitled to 5/18 of that increment, because if the contract had been carried out, that fraction of the increment would have been added to the value of his stock.

The plaintiff's stock in the new corporation would have represented also 5/18 of the value of the mill plant, and had it been taken, gain or loss in its value would have been shared by the plaintiff and the defendants in the proportions of 5/18 and 13/18. But when the defendants breached their contract and brought about the
115–16 diminution in the value of the mill property, they left the plaintiff to bear this entire loss in the diminished value of his stock in the Morgan Lumber Company. The defendants being solely responsible for this loss, all of which fell on the plaintiff, he is entitled to recover the whole from them. The District Court therefore correctly charged that the plaintiff was entitled to recover 5/18 of the net increase in the value of the timber which the defendants retained and the whole of the loss in the value of the plant which the plaintiff alone had to bear and which would not have occurred but for defendants' default.

Stating the matter differently and more succinctly, there was no loss on the timber by reason of the breach of the contract, but the defendants having received the entire increase in its value must account to the plaintiff for 5/18, his share; the default of the defendants brought loss in the value of the plant borne by the plaintiff alone, and for this entire loss the plaintiff must be compensated by the defendants who caused it.

No hard and fast rule as to the measure of damages or the method of ascertaining them for breach of contract can be laid down. Every case depends on its own facts. We have endeavored to show that the District Court adopted in this case the only measure and method by which the direct and proximate loss falling on the plaintiff from the defendants' breach could be ascertained; and the verdict of the jury under the instructions has abundant support in the evidence. It results from the views we have stated that none of the assignments of error are well founded.

Affirmed.

117 *Judgment.*

Filed and Entered July 20, 1917.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1527.

P. D. CAMP, P. R. CAMP and JOHN M. CAMP, Plaintiffs in Error,

vs.

MORGAN V. GRESS, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Virginia.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

July 20, 1917.

C. A. WOODS,
U. S. Circuit Judge.

118 *Order Staying Mandate.*

Filed and Entered August 13, 1917.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1527.

P. D. CAMP, P. R. CAMP and JOHN M. CAMP, Plaintiffs in Error,

vs.

MORGAN V. GRESS, Defendant in Error.

Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk.

Upon the application of counsel for Plaintiffs in Error, and for good cause shown.

It is ordered that the mandate of this Court in the above entitled cause, be, and the same is hereby, stayed pending application of the Plaintiffs in Error in the Supreme Court for a writ of certiorari, provided said application is made on or before the second Monday in October next.

August 13, 1917.

J. C. PRITCHARD,
Senior Circuit Judge.

119 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 25th day of August A. D., 1917.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit,
By CLAUDE M. DEAN, *Deputy Clerk.*

120 United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 25th day of October, 1917, by annexing hereto a certified copy of the stipulation of Attorneys of record, that the certified transcript of record in this cause now on file in the Supreme Court of the United States under the style of P. D. Camp and others, Petitioners, v. Morgan V. Gress, No. 698 of the October Term, 1917, of said Court, shall be taken and received in said Court as a return to the writ of certiorari issued in said Court on the twenty-fifth day of October, 1917.

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 17th day of November, A. D. 1917.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

CLAUDE M. DEAN,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

121 In the United States Circuit Court of Appeals for the Fourth Circuit.

No. 1527.

P. D. CAMP, P. R. CAMP and JOHN M. CAMP, Plaintiffs in Error,

v.

MORGAN V. GRESS, Defendant in Error.

It is hereby stipulated and agreed between counsel of record that the certified transcript of the record in this cause now on file in the Supreme Court of the United States under the style of P. D. Camp and others, Petitioners, v. Morgan V. Gress, No. 698 of the October Term, 1917, of said Court, shall be taken and received in said Court as a return to the writ of certiorari issued in said Court on the twenty-fifth day of October, 1917.

WM. M. TOOMER,
Attorney for Morgan V. Gress, Defendant in Error.
T. D. SAVAGE &
THOS. H. WILLCOX,
Counsel for Plaintiffs in Error.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of Counsel is a true copy of the original filed November 17, 1917, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 17th day of November, A. D., 1917.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

CLAUDE M. DEAN,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

122 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which P. D. Camp, P. R. Camp and John M. Camp are plaintiffs

in error, and Morgan V. Gress is defendant in error, No. 1527, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Virginia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby
123 command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

124 [Endorsed:] 698. 26165. File No. 26165. Supreme Court of the United States, October Term, 1917. No. 698. P. D. Camp et al. vs. Morgan V. Gress. Writ of Certiorari.

125 [Endorsed:] File No. 26165. Supreme Court U. S., October term, 1917. Term No. 698. P. D. Camp et al., Petitioners, vs. Morgan V. Gress. Writ of certiorari and return. Filed November 19, 1917.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917

P. D. CAMP, P. R. CAMP AND JOHN M. CAMP,
Petitioners,

vs.

MORGAN V. GRESS, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURT CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, P. D. Camp, P. R. Camp and John M. Camp, respectfully represent that on the 5th day of April, 1915, Morgan V. Gress instituted an action at law against your petitioners in the District Court of the United States for the Eastern District of Virginia, at Norfolk, for the purpose of recovering damages from your petitioners for the alleged breach of a certain contract made by and between your petitioners as parties of the one part and the said Morgan V. Gress as party of the other part; that upon the trial of the said cause before a jury a verdict was found by the jury in favor of the plaintiff against your petitioners in the sum of Thirty-one Thousand Three Hundred and Sixty-one Dollars and Ten Cents ($31,361.10), and on November 23rd, 1916, a judgment was entered in said Court against your petitioners for that amount; that on February the 15th, 1917, a Writ of Error was granted your peti-

tioners; that on July the 5th, 1917, the case was argued before the United States Circuit Court of Appeals for the Fourth Circuit and on July 20th, 1917 the opinion of the Court, written by Circuit Judge Woods, was delivered affirming the judgment of the Court below for the reasons set forth in the said opinion.

Your petitioners respectfully represent that the decision of the Circuit Court of Appeals is erroneous, in that:

FIRST. It affirmed the action of the District Court in striking out the plea to the jurisdiction of the District Court filed by John M. Camp, one of your petitioners, and thereby affirmed a judgment obtained in the District Court by a non-resident plaintiff against a non-resident defendant over the protest, seasonably made, of the non-resident defendant. As will be noted from the certified record filed with this petition, this action was instituted by Morgan V. Gress, a citizen, resident and inhabitant of the State of Florida, against P. D. Camp and P. R. Camp, citizens and residents of the State of Virginia, and John M. Camp, a citizen, resident and inhabitant of the State of North Carolina, and the only basis of Federal jurisdiction is that the action is between citizens of different States.

Your petitioner, John M. Camp, filed a plea to the jurisdiction at the rule day to which the process was returnable, alleging that he is not a resident, citizen or inhabitant of the Eastern District of Virginia, but that he is a resident, citizen and inhabitant of the Eastern District of the State of North Carolina, and, appearing specially for the purpose, protested that the District Court was without jurisdiction in a case between the plaintiff, a resident of the State of Florida, and himself, a resident of the State of North Carolina. This plea of your petitioner, John M. Camp, was struck out and the District Court took jurisdiction over his protest. This action of the District Court was affirmed by the Circuit Court of Appeals of the Fourth Circuit, upon the ground, as stated in the opinion, that although your petitioner, John M. Camp, was not a resident, inhabitant or citizen of the Eastern District of Virginia, he was found within the District. This action of the Circuit Court of Appeals was based on its opinion that under Section 50 of

the Judicial Code, a United States District Court has jurisdiction over a non-resident of that district in a suit brought by a non-resident of that District, provided the non-resident defendant is found within the District and is sued with another defendant who is a resident of the District.

It is submitted that this ruling ignores the plain language of Section 51 of the Judicial Code, is supported by no decided case, and is in direct conflict with the decisions of this Court, particularly the cases of Ladew v. Tenn. Copper Co., 218 U. S. 357 and Smith v. Lyon, 133 U. S. 315, as will appear by reference to a citation and discussion of the authorities in the brief filed herewith, and reverses the ruling of the Circuit Court of Appeals for the Fourth Circuit, itself, in the case of Camp v. Bonsal, 203 Fed. 913.

It is respectfully urged that it is of prime importance for this Court to review this case and settle the jurisdictional question therein raised in order that the Bar and litigants may have a definite guide for the future, and so know whether or not a District Court can properly entertain jurisdiction and enter a personal judgment against a non-resident of the District at the suit of a non-resident of the District, provided the non-resident defendant is joined with a resident defendant and is found within the District and served with process there, when the only ground of Federal jurisdiction is the fact that the action is between citizens of different States. If Section 50 of the Judicial Code, the purpose of which has heretofore been considered to be to allow a plaintiff to proceed against resident defendants without the Court having before it, and without prejudice to the rights of, non-residents, who would be necessary parties if resident, is to be construed, as the Court in this case has decided, to add a qualifying phrase to Section 51 of the Judicial Code, it is of the highest importance to litigants, as well as to members of the Bar called on to advise them, that such a construction should be authoratively established. This, it is submitted, can only be done by the direct utterance of this Court and would seem to necessitate a review and reversal of the cases heretofore decided by this Court.

SECOND. The opinion of the Circuit Court of Appeals affirms the action of the District Court in allowing the plaintiff, suing as an individual, to recover damages sustained by a corporation, of which corporation he held the stock. This action was brought by the plaintiff, Gress, to recover damages for the alleged breach of a contract made by him personally with the defendants. At the trial of the case, the plaintiff attempted, and was permitted by the District Court, to introduce evidence showing that the alleged breach of the contract made by plaintiff with defendants had resulted in the depreciation in value of property owned by the Morgan Lumber Company, a Florida Corporation, the stock in which corporation was owned by the plaintiff. No evidence was offered as to whether the Morgan Lumber Company, the corporation in question, was solvent or insolvent, or whether the depreciation in value of the property of the corporation actually resulted in a corresponding depreciation in value of the stock of the corporation or not. The District Court, apparently confounding the ownership of stock in a corporation with the ownership of corporate property, charged the jury that if they believed that the plaintiff, Gress, owned the capital stock of the Morgan Lumber Company, then they should consider as an element of the plaintiff's damage, and find for him, the amount of depreciation of the property of the Morgan Lumber Company. This action of the District Court was approved by the opinion of the Circuit Court of Appeals. It is respectfully but earnestly insisted that this ruling is erroneous and without support either on principle or by any decided case. It ignores the fundamental principle of corporate organizations and fails to distingush between the owner of the capital stock of a corporation and the legal corporate entity. If this ruling can be sustained, then a person who owns the entire capital stock of a corporation is, in fact and in law, identical wth the corporation; the purpose for which corporations are created is defeated, and there is no longer any such thing as a corporation with a legal entity separate and distinct from its stockholders; for what one person can do as the holder of the entire stock of a corporation, the holders of all the stock of any corporation acting together could do. If the owner of the entire

stock of a corporation, in his individual right and for his personal benefit, can sue for and recover damages done to or suffered by the corporate property, or a debt due to the corporation, then it must necessarily be true that all of the stockholders of any corporation acting together could likewise sue for and recover damages done to or sustained by the corporate property, or debts due to the corporation, and so the line of demarcation so clearly marked on principle and by the decided cases between a corporation and its stockholders would be obliterated.

An examination of the authorities has failed to disclose any case supporting the view taken by the Court in this case, and we are convinced by the authorities to which more extended reference is made in the brief filed herewith, that a corporation is a legal entity, distinct and separate from its stockholders, whether its entire capital stock is owned by one person or divided among numerous people. In legal contemplation, the stockholders of a corporation, whether one or many, are as separate and distinct entities from the corporation as one person is from another person, or one corporation from another corporation. Stockholders of a corporation are entitled to a distributive share of its ~~proceeds~~ while it continues in operation and, at its dissolution, to a just proportion of the proceeds of the corporate assets remaining; if any, after all of the corporate debts are paid, and that is the full extent of their interest in or ownership of the corporate property.

Your petitioners represent that this case is one that is made final in the Circuit Court of Appeals, and that a final judgment has been entered therein. Your petitioners believe that the aforesaid judgment of the Circuit Court of Appeals is erroneous and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of the Act of Congress in such cases made and provided.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding the said Circuit Court to certify and send to this Court on a day

certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Court of Appeals in the said case therein, entitled "P. D. Camp, P. R. Camp and John M. Camp v. Morgan V. Gress, No. 1527", to the end that the said case may be reviewed and determined by this Court, in conformity with the provisions of the Act of Congress in such cases made and provided; or that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

And your petitioners will ever pray.

THOMAS H. WILLCOX,

T. D. SAVAGE,

Counsel.

CITY OF NORFOLK
STATE OF VIRGINIA } ss.

T. D. Savage being duly sworn says that he is one of the Counsel for P. D. Camp, P. R. Camp and John M. Camp, petitioners; that he prepared the foregoing petition, and that the allegations are true as he verily believes.

T. D. SAVAGE.

Subscribed and sworn to before me by T. D. Savage, this the 6th day of September, 1917.

My commission expires on the 26th day of March, 1918.

JANIE M. CURRIE,

Notary Public.

(Notary's Seal)

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LIST OF CASES REFERRED TO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

P. D CAMP, P. R. CAMP AND JOHN M. CAMP,
Petitioners,

vs.

MORGAN V. GRESS, Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT

This action was instituted in the District Court of the United States for the Eastern District of Virginia, by Morgan V. Gress, Plaintiff, against P. D. Camp, P. R. Camp and John M. Camp, Defendants, for damages claimed for the alleged breach of a contract made between the plaintiff as party of the one part, and the three defendants jointly as parties of the other part. The contract sued on is set out in the declaration in extenso.

At the rule day to which process was returnable, John M. Camp, one of the defendants, filed a plea to the jurisdiction of the court, alleging that he is not a resident, citizen or inhabitant of the Eastern District of Virginia, but that he is a resident, citizen and inhabitant of the Eastern District of the State of North Carolina, and was such at the time of the institution of this action and, appearing specially for the purpose, protested that the District Court of the Eastern District of Virginia was without jurisdiction in a case between plaintiff, a resident, citizen and inhabitant of the State of Florida and himself, a resident, citizen and inhabitant of the State of North Carolina. The District Court, on motion of the plaintiff, struck out this plea of the defendant, John M. Camp, and took jurisdiction of the case over his protest and entered a personal judgment against him. This action of the District Court was affirmed by the Circuit Court of Appeals of the Fourth Circuit, and constitutes one of the errors assigned in the petition for a writ of certiorari in support of which this brief is filed.

THE QUESTION OF JURISDICTION

The jurisdiction of the District Court of the United States is now fixed and determined by the Judicial Code effective January 1st, 1912, which superseded the Act of March 3rd, 1875, and previous Acts on the subject. Section 51 of the Judicial Code reads as follows:

> "Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court: and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the resident of either the plaintiff or the defendant."

The six succeeding sections are applicable to special cases, such as suits of a local nature, suits to enforce a lien or remove clouds from the title to property, etc., and are not material to this discussion.

The basis of jurisdiction in this case admitedly is and could only be "the fact that the action is between citizens of different States." No other basis of Federal jurisdiction is alleged or claimed. The declaration alleges that the plaintiff, Gress, is a citizen, resident and inhabitant of the State of Florida, and the plea in abatement filed herein alleges that the defendant, John M. Camp, is a citizen, resident and inhabitant of the State of North Carolina. This action was brought in the District Court for the Eastern District of Virginia. These are undisputed facts.

The language of our Judicial Code above quoted would seem to be conclusive of the lack of jurisdiction of the court below, as against the defendant, John M. Camp, for *in totidem verbis*, the statute provides that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought *only* in the district of the residence of either the plaintiff or the defendant."

The cases construing the language of this statute are equally conclusive of the lack of jurisdiction of the court below over the defendant, John M. Camp.

In *Ex parte* Wisner, 203 U. S. 499, Mr. Chief Justice Fuller,in delivering the opinion of the court on page 460 says:

> "In the present case neither of the parties was a citizen of the State of Missouri, in which State the suit was brought, and, therefore, it could not have been brought in the Circuit Court in the first instance."

That this is perfectly well settled law, when there is only one defendant, is undisputed and is recognized by the

opinion of the Circuit Court of Appeals in this case. On page 3 of the opinion in this case, there will be found this language: "The Act of 1875 provided that even a single defendant might be sued either in the District of his residence or the District where he was found. Section 51 of the Judicial Code, taking the place of the corresponding section of the Act of 1875, leaves out the provision that a defendant may be sued in the District in which he is found. Therefore, where there is only one defendant, and the jurisdiction depends, as in this case, on diversity of citizenship alone, the suit must be brought in either the District of the residence of the defendant or of the plaintiff."

In the opinion of the Circuit Court of Appeals in this case, however, the result was different, where there was more than one defendant. In such a case if one of the defendants was a resident of the District of suit, then the Court had jurisdiction of all the defendants, provided the non-resident defendants could be found in the District and served with process. Counsel have been able to find no decided case supporting this view nor could the Circiut Court of Appeals. On the contrary, it is in direct conflict with numerous decisions of this and other courts.

In Ladew v. Tenn. Copper Co. 218 U. S. 357, the action was brought in the Circuit Court of the United States for the Eastern District of the State of Tennessee by the plaintiffs, citizens of New York and West Virginia, against the Tenn. Copper Co., a corporation of New Jersey, and Ducktown Sul. & Iron Co., Ltd., a British corporation. Summons was served both on the Copper Company and the British corporation in the Eastern District of Tennessee, where each corporation maintained its main office and conducted its business. Each of the defendants appeared specially for the purpose of objecting to the jurisdiction of the Circuit Court. The Circuit Court, speaking by Judge Sanford, sustained the motion of the Tenn. Copper Co. and dismissed the bill as to it, but overruled the motion of the British Company, holding that it had jurisdiction over an alien corporation. Ladew v. Tenn. Copper Co., 179 Fed. Rep. 245.

This case on appeal was affirmed by this court. Mr. Justice Harlan, delivering the opinion of the court, on page 365, says

> "The plaintiffs, we have seen, are citizens of New York and West Virginia, while Tennessee Copper Company is a corporation of New Jersey. But under the statutes regulating the jurisdiction of the Circuit Court of the United States, diversity of citizenship—nothing more appearing—will not give authority to Circuit Courts of the United States to render a judgment *in personam* where, as here, neither the plaintiffs nor the defendants are inhabitants of the District in which the suit was brought, and where the defendant appears specially and objects to the jurisdiction being exercised over it." And on page 367:
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> "Manifestly, unless the plaintiffs can sustain this proposition and bring their case within the eighth section of the Act of 1875, there is no ground whatever to maintain the jurisdiction of the Circuit Court as to the defendant corporation; certainly not, as we have said, for the purpose of a personal judgment against the defendant company, since neither the plaintiffs nor the defendant are inhabitants of the District in which the suit was brought, and the defendant corporation refuses to voluntarily appear and submit to the jurisdiction of the Court."

We submit that the Ladew case is direct authority, clearly in point and should have been controlling in the case at bar. In the Ladew case the Copper Company, a non-resident, was sued by a non resident together with another defendant properly suable in the District in which suit was brought, and was found in the District of suit and served with process there. The Court held that the bill was properly dismissed against the Copper Company because the basis of jurisdiction was diversity of citizenship, and in such case the statute now embodied in Section 51 of the Judicial Code provides that "suit shall be brought only in the District of the residence of either the plaintiff or the defendant." The Eastern District of Tennessee was not

the residence of either of the plaintiffs or the Copper Company, and it necessarily followed from the language of the statute that the Circuit Court for the Eastern District of Tennessee had no jurisdiction of the Copper Company, and could not, over its protest, entertain jurisdiction of it and enter a personal decree against it, regardless of whether it was the sole defendant or sued with other defendants over whom the court did have jurisdiction.

In Smith v. Lyon, 133 U. S. 315, the action was instituted in the Circuit Court of the United States for the Eastern District of Missouri by C. H. Smith, a resident of that District, and Benjamin Fordyce, a resident of the State of Arkansas, plaintiffs, against O. T. Lyon, a resident of the State of Texas. The defendant, Lyon, who was served with process in the District of Suit, filed a plea to the jurisdiction of the Court on the ground that one of the plaintiffs, Benjamin Fordyce, was a resident of the State of Arkansas and the defendant was a resident of the State of Texas, and that the suit was not, therefore, brought in the District of the residence of either the plaintiff, Fordyce, or the defendant.

In affirming the action of the Circuit Court in dismissing the case for want of jurisdiction, Mr. Justice Miller, delivering the opinion of this Court, on page 316, used this language:

> "This first clause of the act describes the jurisdiction common to all the Circuit Courts of the United States, as regards the subject matter of the suits, and as regards the character of the parties who by reason of such character may, either as plaintiffs or defendants, sustain suits in a Circuit Court. But the next sentence in the same section undertakes to define the jurisdiction of each one of the several Circuit Courts of the United States with reference to its territorial limits, and this clause declares 'that no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but

where the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant.'

In the case before us, one of the plaintiffs is a citizen of the State where the suit is brought, namely, the State of Missouri, and the defendant is a citizens of the State of Texas. But one of the plaintiffs is a citizens of the State of Arkansas. The suit, so far as he is concerned, is not brought in the State of which he is a citizen. Neither as plaintiff nor as defendant is he a citizen of the district where the suit is brought. The argument in support of the error assigned is that it is sufficient if the suit is brought in a State where one of the defendants or one of the plaintiffs is a citizen. This would be true if there were but one plaintiff or one defendant. But the statute makes no provision, in terms, for the case of two defendants or two plaintiffs who are citizens of different States. In the present case, there being two plaintiffs, citizens of different States, there does not seem to be, in the language of the statute, any provision that both plaintiffs may unite in one suit in a State of which either of them is a citizen.

It may be conceded that the question thus presented, if merely a naked one of construction of language in a statute,introduced for the first time, would be one of very considerable doubt. But there are other considerations which must influence our judgment, and which solve this doubt in favor of the proposition that such a suit cannot be sustained."

The court then reviews the original judiciary act of 1789 and the construction given it by Chief Justice Marshall in the case of Strawbridge v. Curtis, 3 Cranch 267, and proceeds further to review the amendments of the original Act, and constructions of the Act as amended by other cases, and concludes its opinion as follows:

"The statute which we are now construing leaves out the provision that if the party has the diverse citizenship required by the statute he may be sued in any district where he may be found at the time of the service of process. The omission of these words, and the increase of the amount in controversy necessary to the jurisdiction of the Circuit Court, and the repeal of so much of the former act as allowed plaintiffs to remove causes from the state courts to those of the United States, and many other features of the new statute, show the purpose of the legislature to restrict rather than to enlarge the jurisdiction of the Circuit Courts, while, at the same time, a suit is permitted to be brought in any district where either plaintiff or defendant resides.

We do not think, in the light of this long-continued construction of the statute by this court during a period of nearly a hundred years, in which the statute has been the subject of renewed legislative consideration and of many changes, it has always retained the language which was construed in the case of Strawbridge v. Curtis, that we are at liberty to give that language a new meaning, when it is used in reference to the same subject matter. It is not readily to be conceived that the Congress of the United States, in a statute mainly designed for the purpose of restricting the jurisdiction of the Circuit Courts of the United States, using language which has been construed in a uniform manner for over ninety years by this court, intended that that language should be given a construction which would enlarge the jurisdiction of those courts, and which would be directly contrary to that heretofore placed upon it by this court."

It is true that in the instant case the particular point decided was that the United States Court was without jurisdiction in a case where there were two plaintiff, one a resident of the District of suit and the other a non resident of that District against a non resident defendant, but the

reasoning and the language employed by this court in its opinion is equally applicable to a case like the case at bar, when there is one non resident plaintiff and two defendants, one a resident of the District of suit and the other a non resident.

In Camp v. Bonsal, 203 Fed. Rep. 913, a case decided in the United States Circuit Court of Appeals for the Fourth Circuit, the suit was brought in the District Court of the United States for the Eastern District of North Carolina by the plaintiff, W. N. Camp, a citizen and resident of the State of Florida, against two defendants, W. R. Bonsal, a citizen and resident of the Eastern District of the State of North Carolina, and R. F. Brewer, a citizen and resident of the State of Tennessee. Defendant, R. F. Brewer, was found within the Eastern District of North Carolina and served with process there. The District Court dismissed the bill for want of jurisdiction, holding that defendant Brewer was an essential party, and that a Federal Court could not take jurisdiction in a case between a non resident plaintiff and a non resident defendant where the only ground of jurisdiction was, as it is in this case, diversity of citizenship. The case was appealed to the Circuit Court of Appeals for the Fourth Circuit, which Court approved the decision of the District Court in holding there was no jurisdiction of the non resident defendant, but disapproved its holding as to the non resident defendant being an essential party, and sent the case back with instructions to dismiss the bill as to the non resident defendant, Brewer, but proceed with the case as to the resident defendant, Bonsal. In the course of its opinion, the Court used this language:

> "The particular court in which the case was brought was created by statute, and may not exercise any jurisdiction except that which the statute gives it. The Act of Congress provides that when jurisdiction is founded, as it is here, solely on the fact that the action is between citizens of different states, the suit shall be brought only in the District of the residence of either the plaintiff or the defendant."

In Freeman v. Am. Surety Co., 116 Fed. Rep. 548, the court says:

> "To authorize a Federal Court to entertain an action brought against a number of defendants, where the jurisdiction is dependent on diversity of citizenship, and the plaintiff is a non resident, all the defendants must be residents of the District in which the suit is brought."

In Tice v. Hurley, 145 Fed. Rep. 391, a part of the syllabus reads as follows:

> "An action cannot be maintained in the Federal Court against a defendant who is a non resident of the District over his objection where the plaintiff is also a non resident, and jurisdiction is founded only on the fact of diversity of citizenship, although the court has jurisdiction of the action by reason of the residence within the District of other defendants."

To the same effect see:

> Sweeney v. Carter Oil Co., 199 U. S. 252;
> Greeley v. Lowe, 155 U. S. 58;
> So. Penn Oil Co. v. Miller, 175 Fed. Rep. 729;
> Turk v. Ill. Cen. R. R., 218 Fed. Rep. 315.

In Shaw v. Quincy Mining Co., 145 U. S. 444, Mr. Justice Gray discussing the effect of the amendment of the statute under consideration by the elimination of the words "in which he shall be found" on page 449 uses this language:

> "As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of earlier acts upon the same subject, and of the judicial construction thereof, is that the phrase 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant,' and cannot be construed as giving jurisdiction, by reason of citizenship, to a Circuit Court held in a State of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the State of which

> he is a citizen, and that this act, therefore, having taken away the alternative, permitted in the earlier act, of suing a person in the district 'in which he shall be found,' requires any suit, the jurisdiction of which is founded only on its being between citizens of different States, to be brought in the State of which one is a citizen, and in the district therein of which he is an inhabitant and resident."

The acceptance of service of process by the defendant, John M. Camp, was only equivalent to the process having been actually served on him by the proper officer of the district of suit. It was not intended to waive and could not be properly considered as a waiver of this defendant's right to object to the jurisdiction of the court, which objection to the jurisdiction this defendant promptly and seasonably made by a proper plea. We do not understand that even counsel for defendant in error contend that the acceptance of process in this case did more than to dispense with the actual physical service of the process by the Marshall. Certainly the decided cases give to the acceptance of service of process no other or greater effect than the actual service of process by a proper officer within the district of suit.

A written acceptance of service of process has no other effect than the actual service by a proper officer would have had, and waives no objection to jurisdiction, and gives no consent to be sued away from the residence of the acceptor.

Butterworth v. Hill, 114 U. S. 128.

The syllabus of U. S. v. Loughrey et al., 43 Fed. 449, reads as follows:

> "Acceptance of service being merely equivalent to personal service in the district, does not prevent a defendant from moving to dismiss the suit because brought in a district in which he does not reside."

It is respectfully but urgently insisted that the court in this case cannot relieve itself of the responsibility of affirming a personal judgment against the non resident

defendant, John M. Camp, at the suit of a non resident plaintiff by remarking (page 5 of opinion):

> "If the court had had no jurisdiction of John M. Camp, the judgment as to him would be a nullity not affecting the judgment rendered against the other defendants."

In the Virginia case of Gray v. Stuart, cited in support of this rather remarkable language, no process whatever had been served on the absent defendant, and he had not been before the court, and as a consequence, the court properly held that the judgment attempted to be entered against him was absolutely void and a nullity, subject to be attacked collaterally and anywhere. The court in that case draws a very clear distinction between an erroneous judgment and a void judgment, saying in the course of the opinion:

> "There is a manifest distinction between an erroneous judgment and a void judgment. The first is a valid judgment though erroneous, until reversed, provided it is the judgment of a court of competent jurisdiction. The latter is no judgment at all. It is a mere nullity. The first cannot be assailed in any other court but an Appellate Court. The latter may be assailed in any court anywhere, whenever any claim is made or rights asserted under it. In the case before us, the judgment against Preston was a void judgment, a mere nullity. It is conceded that no process was ever served upon him, and that he had no notice of any proceedings against him before judgment was obtained. So far as Preston was concerned, the court had no jurisdiction, and the judgment was void in toto; must be so regarded even in a collateral proceeding."

In the case at bar, it is submitted the judgment against John M. Camp is an erroneous judgment and not a void judgment, because process was served on him and he appeared in the case for the purpose of contesting the jurisdiction of the court, and when the jurisdictional question was decided adversely to him, applied to the Circuit Court

of Appeals for a review of the lower court's decision of this jurisdictional question. It would seem to be perfectly manifest,therefore, that unless relief is afforded the defendant, John M. Camp, in this case, the judgment entered against him will be conclusive and not subject to collateral attack in any other court.

This court in the late case of Chicago Life Ins. Co. v. Cherry, 244 U. S. 25, had occasion to pass on a similar question, and a part of the syllabus of that case reads as follows:

> "The claim that a money judgment by a State Court violates due process for want of jurisdiction over the defendant's person, is not sustainable if the jurisdiction was questioned by him by plea in abatement, and by proceedings in the State Courts of review, and sustained after fair hearings before the judgment became finally effective."

THE CASE ON ITS MERITS

This action was instituted by Morgan V. Gress, hereinafter referred to as the plaintiff, to recover damages for the alleged breach of a certain contract between him and P. D. Camp, P. R. Camp and John M. Camp, hereplaintiff and 13/18 to the defendants.

From an inspection of the contract, which is set out in full in the declaration, it will appear that the plaintiff and defendants agreed to organize a corporation under the laws of the State of Florida to be known as the Levy County Lumber Company. To this Company, when organized, the plaintiff was to convey a certain saw mill plant near Jacksonville, Florida, and a lease on the land upon which the mill was located, and the defendants were to convey to the Company, when organized, certain standing timber in the State of Florida. The saw mill plant was valued, by agreement, at $125,000.00 and the standing timber at $325,000.00. These properties were to be conveyed to the Company, when organized, in return for its capital stock of which 5/18 was to be issued to the plaintiffand 13/18 to the defendants.

The declaration sets up the contract in question, alleges its breach by the defendants and claims three separate items of damage:

FIRST: The depreciation in value of the saw mill plant between the date the contract was made and the date of its alleged breach, $100,000.

SECOND: The appreciation in values of the standing timber during the same period $45,833.34.

THIRD: The costs and expenses incurred for maintaining and caring for the saw mill plant during the same period, and for loss of rent on the land, $11,975.00.

It will be observed that approximately two-thirds of the amount of damages claimed by plaintiff is claimed for depreciation in the saw mill plant. This damage is obviously claimed on the theory that the plaintiff as the owner of the saw mill plant sustained a loss by the depreciation of *his* property. This is the only possible theory upon which this claim of damage could be based, for certainly the plaintiff could not recover damages for the depreciation of the property of another.

The first witness introduced by the plaintiff at the trial of this case was the plaintiff himself and during his testimony it developed that neither the saw mill nor the land on which it stood was the property of the plaintiff; that it never had been owned by him, but was owned by the Morgan Lumber Company, a Florida corporation, and had been owned by the Morgan Lumber Company from a time prior to the date of the contract sued on up to the date of the trial; the plaintiff, however, testified that he owned the entire capital stock of the Morgan Lumber Company.

There are numerous assignments of error, but the fundamental error complained of by defendants is that the plaintiff was allowed to recover damages for depreciation of property which he did not own and had never owned. As will be seen from the bills of exception in this record, this point was made and insisted upon at every available opportunity in the course of the trial. Seasonable objection was made to the introduction of any evidence tending

to show depreciation in the saw mill plant in question until it was first shown that the plaintiff owned the saw mill plant, and exceptions were taken and noted to the action of the court in allowing such evidence to be introduced (see bill of exception No. 4): motion was made in the court below at the appropriate time to strike out all evidence tending to show depreciation of the said mill plant and exception duly taken and noted to the action of the court in refusing to strike out such evidence (see bills of exception No. 5); the court below was requested to instruct the jury that if they believed from the evidence that the plaintiff did not own the saw mill plant and never had owned it since the date of the contract sued on, that he was not entitled to recover for any depreciation of said saw mill plant, and due and proper exception was taken to the action of the court below in refusing to give such instruction (see bills of exception No. 6); and due and proper objection was made to the instructions given by the court allowing the jury to consider as an element of plaintiff's damage depreciation of the said saw mill plant, and exceptions taken by the defendants to the giving of such instructions (see bills of exception No. 7).

The evidence introduced showed beyond question that the saw mill plant for depreciation of which plaintiff claims damages belonged to the Morgan Lumber Company, a Florida corporation, and did not, and never had belonged to the plaintiff. Conceding this to be true, and it cannot be successfully denied, the vital question presented by this record, though raised in various form and covered by numerous bills of exception is, stated most favorably to the plaintiff, this:

CAN A PLAINTIFF SUING IN HIS INDIVIDUAL RIGHT RECOVER DAMAGES CAUSED BY DEPRECIATION IN VALUE OF THE PROPERTY OF A CORPORATION, OF WHICH CORPORATION HE OWNS THE ENTIRE CAPITAL STOCK?

The lower court by its rulings in effect held that a person who owns the entire capital stock of a corporation is in fact and in law identical with the corporation. If

tihs be true the purpose for which corporations are created is defeated absolutely, and there is no longer any such thing as a corporation with a separate and distinct legal entity, for whatever one person can do as the holder of the entire stock of a corporation, the holders of all the stock of any corporation, acting together could do, and so the line of demarcation between a corporation and its stockholders would be entirely wiped out and obliterated.

With great deference to the opinion of the learned Judge of the Court below, we submit that this theory is erroneous and finds no support either on principle or in the decided cases. An examination of the authorities, to which we will later refer, convinces us that the question of the ownership of the stock of the corporation does not enter into the question, a corporation is a distinct and separate legal entity whether its entire capital stock is owned by one person or divided among numerous people. In the eyes of the law, the stockholders of a corporation, whether one or many, are as separate and distinct entities from the corporation as one person is from another person, or one corporation from another corpration.

Stockholders of a corporation are entitled to a distributive share of its profits while it continues in operation, and at its dissolution, to a just proportion of the proceeds of the corporate assets remaining, if any, after all of the corporate debts are paid, and that is the extent of their interests or ownership. If a corporation has the right to sue for damages, or any other right of action, any amount recovered would belong to the corporation, and be subject to the payment of its debts and could not be apprpriated by the stockholders. Before it can be ascertained whether or not the stockholders have any interest at all in an amount recovered by the corporation for damage to its property, or otherwise, it is necessary to have an accounting of the affairs of the corporation. If the corporation has more debts than it has assets, then the stockholders have no interest whatever in the corporate funds. Likewise, in the instant case before it can be determined whether plaintiff, as the owner of the stock of the Morgan Lumber Company, has sustained any damage by depreciation in value of the property of Morgan Lumber Company,

an accounting and settlement of the affairs of Morgan Lumber Company would be necessary.

In Thompson on Corporations, Section 1071, the author uses this language:

> "Shareholders are not joint tenants, or in any other sense co-owners of the corporate property, either before or after its dissolution. The title to it vests exclusively in the legal entity called the corporation."

In Cook on Corporations, Section II ,it is said:

> "A stockholder has no legal title to the property or profits of the corporation until a dividend is declared or a division made on the dissolution of the corporation."

In the same work, Section 6, the author, having more particular reference to cases in which all the stock of the corporation is held by a single person, says:

> "A corporation is an entity,an existence, irrespective of the persons who own all of its stock. The fact that one person owns all the stock does not make him and the corporation one and the same person."

Further in the same work, Section 709, it is said:

> "A deed of corporate property by a person who owns all the stock does not convey good title. Although one person owns a majority of the stock, OR ALL OF IT, or all but two shares, he does not in consequence thereof acquire the right to act for the corporation, or as the corporation independently of the directors. One person may own all the stock, and yet the existence, relations and business methods of the corporation continue . . . . A railroad company owning all the stock and bonds of another company does not own the property of the latter and can not sue on a cause of action belonging to the latter."

The above is quoted from the text of the author. In the footnotes to this section there will be found an elaborate citation of authorities from which we select a few:

> "The sole owner of the entire capital stock cannot collect a corporate debt by a suit in his own name. *Randall* v. *Dudley*, III Mich. 437 . . . . . Although one person owns all or nearly all of the stock he cannot act as though he was the corporation. *Chase* v. *Mich, etc. Co.*, 121 Mich. 631 . . . The fact that one person owns all the stock of a corporation does not make him and the corporation one and the same person. The corporation continues to exist. *State* v. *Morgan's etc.*, 106 L. R. A. 513."

The authors above quoted are supported by the decided cases. In the case of *VanAllen* v. *The Assessors* (U. S.), 3 Wall. 573, the court considered a question of whether or not a tax upon the capital stock of a corporation was a tax upon the corporation. Mr. Justice Nelson, delivering the opinion of the court on page 583, uses this language:

> "But, in addition to this view, the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of the *Queen* v. *Arnold*. The question related to the registry of a ship owned by a corporation. Lord Denman observed: 'It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in

no legal sense are the individual members the owners.'

The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest of property, held by the shareholder like any other property that may belong to him."

In *Humphreys* v. *McKissock*, 140 U. S. 304, the court considered the question as to whether or not the property of an elevator company, the stock of which was owned by a railroad, passed by a conveyance of the railroad. Mr. Justice Field, in delivering the opinion of the court on page 311, uses this language:

"The commissioner in his report committed a manifest error in holding that the Wabash Company possessed any interest in the property of the Elevator Company. The facts found by him as to the organization of the latter, the subscription to its stock, the construction of the elevator and its lease to others, show beyond controversy the independent existence of that corporation, and that the railway company had no specific interest in its elevator or other property which it could mortgage. It was a mere stockholder in the Elevator Company. If there had been any doubt on this point, from the evidence before that officer on which he found the facts stated, it must have been removed by the stipulation of the parties.

The court below, therefore, erred in confirming the commissioner's report in that particular and entering a decree that Humphreys and Tutt, as receivers of the Wabash Company, execute and deliver to the petitioner, McKissock, an assignment of an interest supposed to be held by it, or by them

as such receivers, in the Union elevator. That railway company had no interest which it could assign, the building belonged to the Union Elevator Company, and the railway company was entitled by its subscription, when paid, only to a certain proportion of its stock. Both the commissioner, and the court, in confirming his report and entering the decree mentioned, seem to have confounded the ownership of stock in a corporation with ownership of its property. But nothing is more distinct than the two rights; the ownership of one confers no ownership of the other. The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither encumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law.

In *Smith* v. *Hurd*, 12 Met. 371, 285, the relations of stockholders to the rights and property of a banking corporation are stated with this usual clearness and precision by Chief Justice Shaw, speaking for the Supreme Court of Massachusetts, and the same doctrine applies to the relations of stockholders in all business corporations. Said the Chief Justice: 'The individual members of a corporation, whether they should all join, or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security, or chose in action; could not collect a debt, or discharge a claim, or release damage arising from any default,simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined."

In *Syndicate Ins., Co.* v. *Bohn et al.*, 65 Fed. 165; 27 L. R. A. 614, a case decided by the Circuit Court of Appeals of the Eighth Circuit. The Bohns owned certain real estate which was insured in their name. Later they conveyed this real estate to the Bohn Door & Sash Company, a corporation whose entire stock they owned. Later the policies were renewed in the names of the Bohns as owners. Afterwards, there was a fire and the company resisted payment because the policies were not issued in the name of the real owner. The Bohns claimed that they should recover under the policies because they were the owners of the entire capital stock of the corporation,and were thereby in effect the owners of the property. The court decided there could be no recovery on the policies because they were not issued in the name of the owner of the property. Judge Sanborn, in delivering the opinion of the court on page 169, uses this language:

> "By the provisions of these policies which we have quoted, the Bohns made plain contracts with the insurers that they had truly stated their interest in the property insured, and that if that interest was not the sole and unconditional ownership of that property the policies should be void. At the time these policies were issued, and at the time of the fire, they were neither the sole and unconditional owners of this property, nor had they any legal title to it, or any equitable title that they could convert into legal title. The legal title was in a corporation, and they were mere stockholders in that corporation. They could not convey or encumber the title to this property by their deed or mortgage, nor could the title to it be passed or affected by any sale of their interest in it under judgment and execution against them. Stockholders of a corporation are entitled to a distributive share of its profits while it continues in operation, and, at its dissolution, to a just proportion of the proceeds of the corporate assets remaining, if any, after all the corporate debts are paid, but they are far from being the unconditional owners of the

property of the corporation. The title and ownership of such property is vested in the corporation itself,—in an entity as distinct and separate from its stockholders as is any individual trustee from his *cestui que trust*. The corporation itself can sell, convey, mortgage, and deal with the corporate property as its own, subject only to the restrictions of its charter,while its stockholders can do none of these things. These stockholders were not, therefore, the sole or unconditional owners of the property described in these policies. *Riggs* v. *Insurance Co.*, 125 N. Y., 7, 25 N. E. 1058; *Plimpton* v. *Bigelow*, 93 N. Y. 593; *VanAllen* v. *Assessors*, 3 Wall. 573; *McCormick* v. *Insurance Co.*, 66 Cal. 361, 5 Pac. 617; *Philips* v. *Insurance Co.*, 20 Ohio 174, 184.

It is not unworthy of notice here that one of the errors assigned in this record is that the court below excluded evidence of the insolvency of the Bohn Sash & Door Company at the time of the fire. This would have been a fatal error, if it could be conceded that the interest of the Bohns, as stockholders, was insured by these policies. The insurance companies were not liable, in any event, to pay to the Bohns any more than the loss that resulted to their interest from this fire. The extent of that loss was much less if the corporation was insolvent, if the amount of its debts was greater than the value of its assets, and if its stock was consequently worthless, than if the value of its assets exceeded its debts by the par value of its stock, as the court seems to have conclusively presumed."

In *Watson* v. *Bonfills, etc.*, 116 Fed. 157, a case decided by the Circuit Court of Appeals for the Eighth Circuit, it appears that a bank undertook to handle its real estate holdings by organizing two corporations to which the real estate was conveyed, the bank owning the capital stock of the two corporations, and also various notes of the two corporations partially secured by real estate. The question before the court was whether or not the physical

property of the corporation passed by an assignment of the bank of its entire property. Judge Sanborn, delivering the opinion of the court, page 166, used this language:

> "It is conceded that the bank caused the two realty corporations to be organized for the purpose of handling its real estate through them, that it placed the title to it in their names, and that it was practically the sole creditor and the sole stockholder of the two corporations. In view of these facts, counsel for the complainants persistently urge that the real estate was held by the two companies in trust for the bank, that the bank was the equitable owner of the land, and that its assignment conveyed this equitable ownership in trust for its creditors. The two corporations did undoubtedly hold the title to the land in trust for the bank, and the bank was in equity the owner of it; but how did they hold it in trust, and what were the terms that conditioned the equitable ownership of the bank? They held the land and its title in trust for the bank on the same terms and subject to the same rules of law that every corporation holds its property in trust for its creditors and stockholders, and on no other terms; and the bank had the same equitable ownership in this real estate that the creditors and stockholders of any corporation have in its property, and no other. The evidence in this record is conclusive that the corporations agreed that the terms of the trust on which the two realty companies should hold the land for the bank were the terms which conditioned the legal relation of a corporation to its creditors and stockholders, and that they executed that agreement by issuing and delivering to the bank the notes and stock of the corporations, and by establishing between them and the bank the legal relation of corporations to their creditor and stockholder. There is no evidence that these corporations ever consented or agreed that the land should be held on any other terms or subject to any other trust, and, as the law and the relation of the two realty companies to their

stockholder and creditor which these corporations purposely established make the terms of the trust on which it was held express and definite, no implied trust contradicting or varying those terms could have arisen. Where competent parties advisedly agree upon and express the terms of a trust on which property shall be held by some of them, and title to the property is changed accordingly, they are thereby estopped from claiming that an implied trust on different terms arose from the transaction, and as between them no such trust can be inferred.

Nor could the bank disregard or ignore the existence of these realty corporations, and convey their title to this land. It is one thing to create a corporation, and another to dissolve it. It is one thing to vest title to property in a corporation. It is another to divest it. Any one may deed land to a corporation, but no one but the corporation can reconvey it. At the time this assignment was made the title to these lots was in the realty corporations. The bank had no title to them, and no equitable interest in them, except that of a creditor and a stockholder of the corporations that held them. Its deed could not convey and its mortgage could not incumber the title to this land. The corporations which held it were existing entities, as distinct and separate from their stockholder and creditor as is one individual from another. They, and they alone had the power to sell, convey, mortgage, and deal with the lots they held. The charter of the corporations and the law of the land denied their stockholder and creditor this privilege. The limit of its power was to convey the notes and the stock of the corporation which it owned." A writ of *certiorari* was denied in this case. 23 S. C. Rep. 841.

In *Fitzgerald* v. *Mo. Pac. Ry. Co.*, 45 Fed. 812, at page 818, the court uses this language:

"The owner of all the stock and bonds of a corporation does not own the corporate property. The

corporate property, which includes all rights of action and claims for damages, belongs to the corporation, and is subject to the management and control of its Board of Directors. And if it be conceded that the defendant owns all the stock and bonds of the Denver Company, that fact gives it no title to or interest in, the right of way or other property of that company, which it can make the basis of an action or plea in its own behalf."

In *Button v. Hoffman,* 61 Wis. 20; 20 N. W. 667; 50 Am. Rep. 131, Judge Orden, in delivering the opinion of the court uses this language:

"This is an action of replevin in which the title of the plaintiff to the property was put in issue by the answer. In his instructions to the jury the learned judge of the circuit court said: 'I think the testimony is that the plaintiff had the title to the property.' The evidence of the plaintiff's title was that the property belonged to a corporation known as 'The Hayden & Smith Manufacturing Company,' and that he purchased and became the sole owner of all of the capital stock of said corporation. As the plaintiff in his testimony expressed it, 'I bought all the stock. I own all the stock now. I became the absolute owner of the mill. It belonged at that time to the company, and I am the company.' There was no other evidence of the condition of the corporation at the time. Is this sufficient evidence of the plaintiff's title? We think not. The learned counsel of the respondent in his brief says: 'The property had formerly belonged to the Hayden & Smith Manufacturing Company, but the respondent had purchased and become the owner of all the stock of the company, and thus became its sole owner.'

From the very nature of a private business corporation, or indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial person substituted for the natural persons who

procured its creation, and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed and disposed of . . . . . A legal distribution of the property after a dissolution of the corporation and settlement of its affairs, is the inception of any title of a stockholder to it, although he be the sole stockholder. Eng. & A. Corp. 779a.

These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not, therefore, own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else. The consequences of a violation of these principles would be that the stockholders would be the private and joint owners of the corporate property, and they could assume the powers of the corporation, and supersede its functions in its use and disposition for their own benefit without personal liability, and thus destroy the corporation, terminate its business, and defraud its creditors. The stockholders would be the owners of the property, and, at the same time, it would belong to the corporation. One stockholder owning the whole capital stock could, of course, do what several stockholders could lawfully do. It is said in *City of Utica* v. *Churchill*, 33 N. Y. 161: 'The interest of a stockholder is of a collateral nature, and is not the interest of an owner,' and in *Hyatt* v. *Allen*, *supra*, that 'a shareholder in a corporation has no legal title to its property or profits until a division is made."

In *Randall* v. *Dudley*, III. Mich. 437, 69 N. W. Rep. 729, the question before the court was whether or not a person who had purchased the entire capital stock of a corporation could, in his own name, bring suit on an open account due the corporation. In that case it appeared that after the plaintiff had bought the entire capital stock of the

corporation, the corporation practically went out of business and its affairs had been largely wound up. The court held that before an individual, although he owned the entire capital stock of the corporation, could bring suit to collect a debt due to the corporation, he must allege and prove that the account had been assigned to him, or that in some other way, other than as a stockholder of the corporation, he had succeeded to the interest of the corporation in the account. The syllabus of this case reads as follows:

> "The mere fact that one has become the sole owner of the stock of a private corporation does not entitle him to sue in his own name on an account stated. He must aver and prove his succession to the interests of the corporation."

In the course of the opinion, the court uses this language:

> "Plaintiff, claiming to have succeeded to the rights of the Cross Lumber Company, brings this action, alleging an account stated, and was permitted to recover in the court below. Numerous errors are assigned, but we think the case must turn upon the question of the right of the plaintiff to maintain the action in his own name. On the trial it was objected that the plaintiff could not recover, for the reason that no sale or assignment of the Cross Lumber Company claim to plaintiff was alleged in the declaration . . . . . But even if averred, it was not shown, as the extent to which the proof went was that the plaintiff had become the sole owner of the stock of the corporation. This did not entitle him to sue in his own name."

In *City of Louisville* v. *McAteer* (Ky.) 81 S. W. Rept. 698, the question before the court was whether or not the property of a water company, all of the capital stock of which company, was owned by the City, was liable to be taxed by the City. It was held that the property of a water company was subject to tax by the City for the reason that the ownership of capital stock did not make the City

the owner of the property. In the course of the opinion, it is said:

> "It is not true, in law, that the owner of all the stock of a corporation owns the property of a corporation (citing numerous cases) even if there was not the weight of authority for the last statement, the City would scarcely want to take the full effect of its contention, for, if it did, then it would follow that the company's debt was the City's debt; adding the bonded debt of the water company of about one and one-half millions, to the City's other authorized debt, might operate to invalidate some of its recent bond issues. If, upon a foreclosure of the mortgage upon the water plant, it was insufficient to pay the bonded debt, the City would not care to be bound for the balance because it happened to own all the debtor corporation's stock.
>
> There is another fallacy in appellee's position: This is not an effort to tax the capital stock or shares of the water company. If it were, then the question would be here whether the City could tax its own property for its own use. There is a marked distinction, though, between taxing the property of a corporation and taxing its shares of stock."

In re Goetz's Estate (Pa.), 85 Atl. Rep. 65, there is an interesting discussion on the difference between owning the property of a corporation and owning its capital stock. In that case the Executors of the Estate formed a corporation to which was conveyed the property of the Estate. The court below adjudicated the Estate just as if there had been no corporation. The appellate court reversed this action, and in the course of the opinion, used this language:

> "This anomalous adjudication was made because the court found that the estate of the testator was the owner of 1,494 of the 1,500 shares of the capital stock of the Ferdinand Goetz Sons' Company, or 6 shares less than the entire stock issue. Suppose the estate was the owner of all the stock, what the

court below did would be none the less anomalous. The estate, as a holder of all the stock, would not be the owner of the corporation, but only of the shares of its capital stock, which constitutes a species of property entirely distinct from the corporate property.

A shareholder has no distinct and individual title to the moneys or property of the corporation, nor any actual control over it. *Bidwell* v. *Pittsburgh, Oakland & East Liberty Passenger Railway Co.*, 114 Pa. 535, 6 Atl. 729. We have been referred to no authority, and we know of none, that asserts the doctrine that the purchaser of all the shares of the capital stock of a corporation thereby becomes the owner of its property. On the contrary, the principle is well established that the shares of the capital stock of a corporation are essentially distinct and different from the corporate property, and that the owner of all the stock of a corporation does not own the corporate property or become entitled to manage or control it. 'A corporation,' says Mr. Cook in his work on Corporations (section 6) 'is an entity, an existence, irrespective of the persons who own all its stock. The fact that one person owns all of the stock does not make him and the corporation one and the same person.' In Morawetz on Private Corporations, 1009, it is said that 'it is well settled that all the shares in a corporation may be held by a single person, and yet the corporation continues to exist; and, if the charter or by-laws should require certain acts to be done by more than one shareholder, the sole owner may transfer a portion of his shares to other persons, so as to conform to the letter of the rule.' In *Bidwell* v. *Pittsburgh etc. Pass. Railway Company*, 114 Pac. 535 (6 Atl. 729), Mr. Justice Clark, delivering the opinion of the court, says: 'The shares in a corporation constitute a species of property entirely distinct from the corporate property. A shareholder has no distinct and individual title to the moneys or property of the corporation, nor any actual control over it. The

shares represent a right to participate in profits only.'"

In *Philips, Beckel & Co.* v. *The Knox County Mutual Ins. Co.*, 20 Ohio Rep. 174, the syllabus reads as follows:

> "Where a building and the land on which it stands is the property of an incorporated company, the stockholders of the company cannot insure the same as their individual property in a mutual insurance company."

In the course of the opinion, Chief Justice Hitchcock, on page 185, used this language:

> "But it is said these plaintiffs were the sole stockholders of the Dayton Hydraulic Company and might, therefore, well insure the property of that company as their own individual property. We think not. We can find no authority sustaining any such principle, and no one is referred to. An execution upon a judgment against Philips, Beckel & Company could not be levied upon the property of the Dayton Hydraulic Company. Neither could an execution upon a judgment against the Dayton Hydraulic Company be levied upon the individual properties of Philips, Beckel & Company. In truth, the property of the Hydraulic Company is just as distinct from the individual property of these plaintiffs as would be the individual property of Horatio G. Philips from that of Daniel Beckel."

To the same effect see:

Sellers v. *Greer*, 172 Ill. 549; 40 L. R. A. 589;

Commonwealth v. *Monongahela Bridge Co.* (Pa.) 64, Atl. 909;

Rhawn v. *Edgehill Furnace* (Pa.) 51 Atl. 360;

Brock v. *Poor* (N. Y.) 111 N. E. 229;

Thompson v. *Stanley*, 20 N. Y. Sup. 317;

Harton v. *Johnson* (Ala.) 51 So. 992;

Park v. *Petroleum Co.*, 25 W. Va. 108.

It is confidently submitted that both the text writers and decided cases establish beyond controversy that a stockholder in a corporation, whether he owns a part of the stock, or all of the stock, cannot maintain in his own individual name, a suit for damage done to or suffered by, the corporate property. It follows that the court below committed a reversable error in allowing the jury to take into consideration, in establishing damages for the plaintiff, depreciation in property which admittedly belonged to a corporation and did not, and never had belonged to plaintiff. It is obvious from an inspection of the record that this depreciation in the property of the Morgan Lumber Company was the main item upon which the jury estimated damages. We submit, therefore, that the case should be reversed and sent back to the lower court with directions to limit the plaintiff in his recovery to the damage that he himself has sustained.

Even counsel for plaintiff in the court below conceded that plaintiff was not entitled to recover the amount of rent for land on which the saw mill plant was situated, which was due to the Morgan Lumber Company, the owner of the land, as well as the plant, and which rent the plaintiff had not paid and was not obligated for. It is, we think, equally obvious that the plaintiff should not have been allowed to recover for the depreciation of property which he did not and never had owned. If any one sustained loss by depreciation of this property it was the owner of the property and not the plaintiff.

In the light of the above authorities it is obvious, we think, that the court committed manifest error prejudicial to the defendants below in giving, at the instance of the plaintiff below, its first instruction from which we quote as follows:

> "You will first determine from the evidence what was the fair market value on August 18, 1913,

of the properties proposed to be contributed by the plaintiff, Morgan V. Gress, to Levy County Lumber Company, in exchange for his portion of the capital stock provided for in the contract. You will then ascertain from the evidence what was the fair market value of these properties on the date when it is alleged that the contract was breached, and if you find that there was a depreciation in the value of these properties between the dates named, *and that the plaintiff, Morgan V. Gress, was the owner of all of the stock of Morgan Lumber Company, which held the titles to these properties,* and that said Company was at all times willing and ready to carry out the contract as made by said Gress, and to convey said properties as contracted for by him, the difference in the amounts thus found will be one of the elements of damages recoverable by the plaintiff." (Italics ours.)

Even if we should be wrong, though we cannot believe it possible, in thinking that the above quoted instruction is based on an erroneous view of the law governing corporations and their stockholders, it seems to us perfectly manifest that the above instruction is erroneous for another reason.

It will be remembered that under the terms of the contract, if the Levy County Lumber Company had been formed, as contemplated, the plaintiff would have owned 5/18 of its capital stock and the defendants 13/18. The evidence shows beyond controversy that both plaintiff and defendants agreed that even if the Levy County Lumber Company had been organized and taken title to the saw mill plant, that the plant should not, and would not have been, operated. The court below instructed the jury that upon this question there was no controversy between the parties under the evidence as submitted. It is manifest, therefore, that if the Levy County Lumber Company had been organized as contemplated by the contract and the saw mill plant in question had been conveyed to it, as contemplated, that the saw mill plant would have depreciated exactly the same amount that it did. The mere change of

title to the plant would not have effected the amount of its depreciation. The plaintiff, as the owner of 5/18 of the stock of the corporation would, as a consequence, have borne 5/18 of that depreciation. In other words, if the saw mill plant had been conveyed to the Levy County Lumber Company as contemplated by the contract, the plaintiff, as the owner of 5/18 of the stock of Levy County Lumber Company, would have sustained 5/18 of the loss by depreciation of the plant. As the saw mill plant was not conveyed to the corporation, the owner of the plant has had to bear the entire depreciation of the plant. It follows, therefore, that even if the above quoted instruction was right on principle, the jury should have been told that they should first fix the amount of depreciation of the plant during the time mentioned and then find for the plaintiff for only 13/18 of the amount of such depreciation. To express it differently, the plaintiff is only entitled to recover the difference between the loss he would have sustained had the contract been carried out and the loss he has sustained with the contract not carried out. Had the contract been performed, the plaintiff as the owner of 5/18 of the stock of the Company which owned the plant would have borne 5/18 of the depreciation of the saw mill plant. The contract not having been performed, the plaintiff has borne the entire depreciation of the plant. Obviously, therefore, the loss or damage sustained by the plaintiff is what he has lost, less what he would have lost, had the contract been performed, which is the whole amount of depreciation of the saw mill plant less 5/18 of such amount of depreciation, i. e., 18/18 the whole, less 5/18 or 13/18 of the amount of the plant's depreciation.

As will be seen from the second instruction given by the court (R. p. 94) when it came to the loss claimed by the plaintiff in not getting the appreciation of the timber which was to be conveyed to the corporation by defendants, this rule was followed and the jury were told that they should first find the amount of that appreciation in the time mentioned and should then allow to the plaintiff 5/18 of the amount of such appreciation in the timber. Just why the court should have given a proper regard to the proportion of loss that the plaintiff was entitled to in the appreciation

of the timber and should have refused to take into account this proportion when it came to depreciation of the saw mill plant and allow the plaintiff to recover for the entire depreciation of the saw mill plant when even if the contract had been performed, as contemplated, he would still have borne 5/18 of the depreciation, we are frankly unable to understand. When it is remembered that the amount of the depreciation of this saw mill plant was placed at $100,000.00, it is very apparent that the defendants were greatly prejudiced by the jury being allowed to find against them the entire depreciation of the saw mill plant, instead of only 13/18 thereof.

THOS. H. WILLCOX,

T. D. SAVAGE,

Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 279.

P. D. CAMP, P. R. CAMP, AND JOHN M. CAMP,
PETITIONERS,

vs.

MORGAN V. GRESS, RESPONDENT.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF COUNSEL FOR THE RESPONDENT.

W. M. TOOMER,
D. LAWRENCE GRONER,
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This action was commenced in the District Court for the Eastern District of Virginia by Morgan V. Gress, a resident and citizen of the State of Florida, as plaintiff, against P. D. Camp, P. R. Camp, and John M. Camp, who were alleged to be citizens and residents of said district, as defendants, to require them to respond in damages to the plaintiff for the breach of a contract executed between them. Service of

process was made upon P. D. and P. R. Camp, and the remaining defendant accepted service for himself.

John M. Camp protested the jurisdiction of the court over his person by plea, wherein he claimed himself to be a resident and citizen of the State of North Carolina, and asserted that, as to him, the action was not brought either in the district of the residence of the plaintiff or of the defendant. His plea was an effort simply towards securing exemption from suit except in the district of his own residence.

P. D. and P. R. Camp are admittedly citizens and residents of the Eastern District of Virginia, but conceiving the action to be of such a nature that the presence of every one of the defendants was necessary to the maintenance of it in any court, they also filed a plea reiterating the objection presented by their codefendant, John M. Camp, and undertook to oust the jurisdiction of the court as to themselves should the plea of the defendant, John M. Camp, prevail.

Upon motion of the plaintiff the district court struck these pleas, and this ruling is assigned as error.

The question presented by these pleas was two-fold:

First. Assuming that John M. Camp could not be compelled to defend in this proceeding owing to the personal privilege asserted by him of being sued only in the district of the residence of either himself or the plaintiff, was he an "indispensable party" in whose absence the court could not proceed to final judgment as against the remaining defendants over whom the jurisdiction of the district court had otherwise properly attached? And, secondly, under the facts presented by this case, could John M. Camp, who claims to be a resident and citizen of State of North Carolina, successfully assert in this case the privilege of being sued only in the district of the residence of either himself or the plaintiff?

These questions each received a negative answer from the learned judge of the district court, before whom they were very fully presented both on oral argument and by briefs of counsel for the respective parties.

JOHN M. CAMP WAS NOT AN INDISPENSABLE PARTY DEFENDANT TO THIS CAUSE.

Who is an indispensable party? What is the nature of the right which determines the character of a party as being either *formal, necessary,* or *indispensable?* Does this right arise arbitrarily, or is it dependent upon the circumstances of the particular case before the court? These questions are answered in the following authorities:

> "The court here points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

Shields *et al. vs.* Barrow, 7 How., 130; 15 Law Ed., 158, text, p. 160.

> "The learning on the subject of parties to suits in chancery is copious, and within a limited extent, the principles which govern their introduction are flexible. There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that while they may be called proper

> parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such, that if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties if within its jurisdiction before deciding the case. But if this cannot be done, it will proceed to administer such relief as may be in its power, between the parties before it. And there is a third class whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to the jurisdiction."

Barney *vs.* Baltimore, 6 Wall., 280; 18 Law Ed., 825, text, p. 826.

> (After citing section 737 of the Revised Statutes of the United States—U. S. Compl. Stat. 1901, p. 587—the substance of which is now embraced in section 50 of the Judicial Code, and also referring to the 47th equity rule, to the like effect, the United States Supreme Court, in another case, says):
>
> "This statute and rule permit the court to proceed with the trial and adjudication of the suit, as between parties who are properly before it, and preserves the rights of parties not voluntarily appearing, providing their rights are not prejudiced by the decree to be rendered in the case. * * * This rule does not permit a Federal court to proceed to a decree in that class of cases in which there is an absence of indispensable, as distinguished from proper, or even necessary, parties, for neither the absence of formal, nor such as are commonly termed necessary, parties, will defeat the jurisdiction of the court; provided, in the case of necessary parties, their interests are such and so far separable from those of parties before the court, that the decree can be so shaped that the rights of those actually before the court may be determined without necessarily affecting other persons not within

the jurisdiction. After pointing out that there may be formal parties, of whose commission the court takes no account, Mr. Justice Miller, in delivering the opinion in *Barney vs. Baltimore,* 6 Wall., 280; 18 L. Ed., 825, went on to say:

" 'There is another class of persons whose relations to the suit are such, that if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties, if within its jurisdiction, before deciding the case, but, if this cannot be done, it will proceed to administer such relief as may be in its power between the parties before it. And there is a third class whose interests in the subject-matter of the suit and in the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction.'

"The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of such absent party. 1 Street, Fed. Eq. Pr., sec. 519.

"If the court can do justice to the parties before it without injuring absent persons, it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent persons. *Payne vs. Hook,* 7 Wall., 425; 19 L. Ed., 260."

Waterman *vs.* Canal-La. Bank & Trust Co. *et al.,* 215 U. S., 33; 54 L. Ed., 80, text, p. 86.

And for a thorough discussion of the same subject, with citations of authorities, see

Rose's Code, Fed. Pro., vol. 1, sec. 817, *et seq.*

Helpful, also, by way of illustration, in determining who

is a formal, necessary or indispensable party, are the following cases which were considered by the court below:

Farni et al. vs. Tesson, 1 Black., 309; 17 L. Ed., 67.
Riddle & Co. vs. Mandeville et al., 5 Cranch, 322; 3 L. Ed., 114, text, p. 117.
Russel vs. Clarke's Execr. et al., 7 Cranch, 69; 3 L. Ed., 271; text, p. 281.
Marshall vs. Beverly, 5 Wheat., 313; 5 L. Ed., 97.
Conn. et al. vs. Penn., 5 Wheat., 424; 5 L. Ed., 125.
Harding et al. vs. Handy et al., 11 Wheat., 103; 6 L. Ed., 429.
Mallow et al. vs. Hinde, 12 Wheat., 193; 6 L. Ed., 599.
Bank vs. R. R. Co., 11 Wall., 624; 20 L. Ed., 82.
Ribon vs. R. R. Co., 16 Wall., 446; 21 L. Ed., 367.
Bank vs. Campbell, 14 Wall., 87; 20 L. Ed., 832.

IT IS EVIDENT FROM A PERUSAL OF THE FOREGOING AUTHORITIES THAT THE QUESTION AS TO THE JOINDER OF PARTIES IN MANY CASES IS ONE WHICH ADDRESSES ITSELF TO THE DISCRETION OF THE COURT UNDER THE CIRCUMSTANCES OF THE PARTICULAR CASE BEFORE IT.

The prevailing rule has been stated as follows:

> "However numerous the persons interested in the subject of a suit, they must all be made parties plaintiffs or defendants, in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of a suit to make the performance of the order perfectly safe to those who have to obey it, and to prevent future litigation." And again, "all persons are to be made parties who are legally or beneficially interested in the subject-matter and result of the suit," extending in most cases to heirs-at-law, trustees and executors.'"

Caldwell *vs.* Taggart *et al.*, 4 Peters, 190; 7 L. Ed., 828, text, p. 832.

But to this general rule there were always well recognized exceptions, as where the party not joined was a necessary, as distinguished from an indispensable, party, and was beyond the jurisdiction of the court, or where his interest was merely nominal, or his joinder, if made, would oust the jurisdiction of the court as to the parties before it. The propriety of requiring the joinder of an omitted party is oftentimes a question of expediency in the administration and furtherance of justice, and a reading of the adjudicated cases will show the flexibility of the general rule:

Mallow et al. vs. Hinde, 12 Wheat., 193; 6 L. Ed., 599; text, p. 600.

Omaha Hotel Co. vs. Wade et al., 7 Otto, 13; 24 L. Ed., 917, text, p. 919.

Mandeville vs. Riggs, 2 Peters, 482; 7 L. Ed., 493, text, p. 494.

See also:

Harding vs. Handy et al., 6 L. Ed., 429.

Cameron vs. Roberts, 3 Wheat., 591.

Simms vs. Guthrie, 3 L. Ed., 642.

Having considered the question as to parties, the necessity for their joinder and the reasons excusing their omission, we come now to the more important point as to what effect the enactment known as the act of February 28, 1839 (now section 50 of the Judicial Code), had upon the procedure in the respective courts of equity and those pursuing the course of the *common* law. The section in question reads as follows:

> "Sec. 50. When there are several defendants in any *suit at law* or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but

> the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district as aforesaid, shall not constitute matter of abatement or objection to the suit."

The court in the case of Shields *et al vs.* Barrow, writing to the point which we have just suggested, in so far as the equity procedure is concerned, says:

> "The act relates solely to the non-joinder of persons who are not within the reach of the process of the court. It does not affect any case where persons, having an interest are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and so far as it touches suits in equity, we understand it to be no more than a legislative affirmance of the rule previously established by the cases of *Cameron vs. McRoberts*, 3 Wheat., 591; *Osborne vs. Bank of U. S.*, 9 Wheat., 738, and *Harding vs. Handy*, 11 Wheat., 132. For this court had already there decided that the non-joinder of a party, who could not be served with process, would not defeat the jurisdiction." * * *

Shields *et al. vs.* Barrow, 17 How., 130; 15 L. Ed., 158, text, p. 161.

THE ACT BEING MERELY DECLARATORY OF THE RULE WHICH ALREADY PREVAILED IN THE COURTS OF CHANCERY IN THE ABSENCE OF STATUTE, DID NOT BROADEN THE JURISDICTION OF THOSE COURTS; AND ITS PRINCIPAL EFFECT, THEREFORE, WAS LIMITED TO COMMON-LAW CASES.

Cladbourne vs. Coe, 10 U. S. App., 83.
Barney vs. Baltimore, 6 Wall., 280, cited (*supra*).
Inbusch vs. Farwell, 1 Black., 566.
Cameron vs. M'Roberts, 3 Wheat., 591.

Osborne vs. Bank, 9 Wheat., 738.
Harding vs. Handy, 11 Wheat., 132.
Blume, etc., vs. Baldwin, 87 Fed., 785.
Gross vs. Geo. W. Scott Mfg. Co., 48 Fed., 35.

The change worked by the act in cases where the Federal courts pursue the course of the common law, however, was very material; and especially beneficial were the results that it accomplished. No clearer exposition of this phase of the law has come to our attention than that embodied in the opinion of Mr. Justice Miller, in the case of Barney *vs.* Baltimore. Discussing the question of parties, and after citing the case of *Shields vs. Barrow*, 18 L. Ed., 825, he says:

> "The court there says, in relation to this act, that 'it does not affect any case where persons having an interest are not joined, because their citizenship is such that their joinder would defeat the jurisdiction, and so far as it touches suits in equity, we understand it to be no more than a legislative affirmance of the rule previously established by the cases of *Cameron vs. McRoberts*, 3 Wheat., 591; *Osborne vs. Bank of U. S.*, 9 Wheat., 738; and *Harding vs. Handy*, 11 Wheat., 132.' * * * The act says that it shall be lawful for the court to entertain jurisdiction; but as is observed by this court in *Mallow vs. Hinde*, 12 Wheat., 198, when speaking of a case where an indispensible party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court'; so that while this act removed any difficulty as to jurisdiction between competent parties regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. * * * It remains true, notwithstanding the act of Congress and the forty-seventh rule, that a circuit court can make no decree affecting the rights of an absent per-

son, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit, without affecting those rights." *North. Ind. R. R. Co. vs. Mich. Cent. R. R. Co.*, 15 How., 233.

"These views do not render the act of 1839 either useless or ineffectual, for while it is true that in reference to parties in chancery proceedings, that act only pronounced the rule which this court had previously asserted, its beneficial influence in cases of common-law cognizance are often called into exercise. *It is a rule of the common law, that where one of the several joint obligors in a contract, whether verbal or in writing, is sued alone, he can plead the non-joinder of the obligors in abatement, and in cases where the joint obligors not sued were citizens of the same State with the plaintiff, or were residents of some other district than that where the suit was brought, the jurisdiction of the court was defeated. This very serious difficulty was remedied by the act of 1839; for in such cases the plaintiff can now prosecute his suit to judgment against any one of such joint obligors, in any district where he may be found.* Of this class of cases are *Inbush vs. Farwell*, 1 Black, 566, (66 U. S., XVII., 188), and others which preceded it.

"But this rule does not conflict with that under which the courts of chancery act in refusing to make a decree, where by reason of the absence of persons interested in the matter, the decree would be ineffectual, or would injuriously affect the interest of the absent parties. *In the class of cases, just mentioned, at common law, the plaintiff, by his judgment against one of his joint debtors, gets the relief he is entitled to, and no injustice is done to that debtor, because he is only made to perform an obligation which he was legally bound to perform before. The absent joint obligors are not injured, because their rights are in no sense affected, and they remain liable to contribute to their co-obligor who may pay the judgment by suit, as they would have been had he paid it without suit.*" (The Italics are our own.)

Barney *vs.* Baltimore, 6 Wall., 280; 18 L. Ed., 825, text pp. 826-27:

Controlling as to, and decisive of the character of John M. Camp as a party defendant to this proceeding is the decision in Clearwater *vs.* Meredith et al., which was an action to enforce a contract of guaranty in writing, brought by the plaintiff, a citizen of Ohio, against Thomas Tyner and Solomon Meredith, citizens and residents of Indiana, together with one Caleb Smith, who at the time of the commencement of the action was not a citizen of the State of Indiana, and who, therefore, was not joined as defendant. The action was begun in the Circuit Court for the District of Indiana. The defendants who were served filed a demurrer in which they challenged the jurisdiction of the court, and the demurrer was sustained. Counsel for defendants, in his brief upon appeal, contended that the action was a joint contract, and that the omission of Smith was fatal to the maintenance of the case. He argued that the rule was that where there are two or more joint plaintiffs or defendants, each of the plaintiffs must be capable of suing and each of the defendants of being sued in order to support the jurisdiction; and that jurisdiction was not disclosed as to the absent defendant. Mr. Justice McLean, in considering the defendants' contentions, and in delivering the opinion of the court says:

> "If this," speaking of the defendants' demurrer, "be regarded as a plea to the jurisdiction of the court, it is argued that the suit is brought on a joint contract executed by the defendants in error, when only two of them were served with process, and the third one, Caleb B. Smith, who, at the time of the commencement of the suit, was not a citizen of the State of Indiana, and is therefore not joined as a defendant herein, &c.
>
> "The first section of the act of February 28, 1839, provides that 'where, in any suit at law or in equity commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the dis-

trict where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer.'

"In the case of *The Bank of Vicksburg vs. Slocomb*, 14 Pet., 65, it is said the 11th section of the Judiciary Act declares that no civil suit shall be brought, before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

"It has been held that this is a personal privilege of not being sued out of the district in which the defendant may live, or in which he shall be found on serving the writ, and that it may be waived by the defendant." (Italics are our own.) "And it is said," in the above opinion, "that it did not contemplate a change in the jurisdiction of the courts, as it regards the character of the parties, as prescribed by the Judiciary Act, and expounded by this court—that is, that each of the plaintiffs must be capable of suing, and each of the defendants capable of being sued; which is not the case in this suit, some of the defendants being citizens of the same State with the plaintiffs."

"It is well known that the act of 1839 was intended so to modify the jurisdiction of the circuit court as to make it more practical and effective. Where one or more of the defendants sued were citizens of the State, and were jointly bound with those who were citizens of other States, and who did not voluntarily appear, the plaintiff had a right to prosecute his suit to judgment against those who were served with process; but such judgment or decree shall not prejudice other parties not served with process, or who do not voluntarily appear.

"Now, it is too clear for controversy, that the act of 1839 did intend to change the character of the

parties to the suit. The plaintiff may sue in the circuit court any part of the defendants, although others may be jointly bound by the contract, who are citizens of other states." (The italics are ours.) "The defendants who are citizens of other states are not prejudiced by this procedure, but those on whom process has been served, and who are made amenable to the jurisdiction of the court.

"And in regard to those whose rights are in no respect affected by the judgment or decree, it can be of no importance of what States they are citizens. If one of the defendants should be a citizen of the same State with the plaintiff, no jurisdiction could be exercised as between them, and no prejudice to the rights of either could be done.

"The plea to the jurisdiction seems not to be well taken, and it cannot be sustained."

The judgment was accordingly reversed.

Clearwater *vs.* Meredith et al., 21 How., 489; 16 L. Ed., 201, text, p. 202:

> "Jurisdiction in the Federal courts is not defeated by the suggestion that other parties are jointly liable with the defendants, provided it appears that such other parties are out of the jurisdiction of the court; but it is expressly provided by the act of the 28th of February, 1839, that the judgment of decree rendered in the case shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer. 5 Stat. at L., 32; *D'Arcy vs. Ketchum*, 11 How., 165; *Clearwater vs. Meredith*, 21 How., 492."

Inbusch *vs.* Farnwell, 1 Black., 566; 17 L. Ed., text, p. 190-91:

See also:

Schiffer vs. Anderson, 146 Fed., 457.

These decisions we respectfully submit, are conclusive upon the question of parties in the instant case; and under

them it is plainly evident that John M. Camp, *though he had not been found and served with process in the Eastern District of Virginia*, cannot be considered an "indispensable party" to this proceeding, for whose non-joinder the remaining defendants would have been entitled to abate the action.

In so far as the instant case might be considered as coming within the decisions announced in Strawbridge *vs.* Curtis, 2 L. Ed., 435, or Bank *vs.* Devoux, 5 Cranch, 84, we only stop to call the court's attention to the rigid criticism to which those decisions were subjected, and the manner in which their operation was restricted and controlled in the latter case of The L. C. & C. R. R. Co. *vs.* Letson, 11 L. Ed., 353, text, pp. 376 and 377.

Nor can the case of Smith *vs.* Lyon, 33 L. Ed., 635, have any controlling weight here, for the reason that the action there was *by plaintiffs in joint interest against a sole defendant*, a condition clearly not within the purview of the act of 1839, (now section 50 of the Judicial Code); and it is evident that the court in making its decision in that case did not take that act into consideration, but based its judgment solely upon the act of March 3, 1887, as amended.

So far as the plea of P. D. and P. R. Camp attempted to set up any supposed privilege in their co-defendant, John M. Camp, of being sued in another district, it was wholly without merit; for such privilege, if any existed, was personal to John M. Camp and could be urged by him alone:

Clearwater vs. Meredith, 16 L. Ed., 201, 202.
Tice vs. Hurley et al., 145 Fed., 391.
Schiffer vs. Anderson, 146 Fed., 457; 76 C. C. A., 667.
Railway vs. McBride, 35 L. Ed., 659.

Their plea, to the extent that it was entitled to any consideration, was in abatement for the supposed inability of the plaintiff to bring into court the defendant John M. Camp, their joint obligor, who was claiming exemption from suit

in the Eastern District of Virginia. A plea of this character usually is not considered as good unless it give the name of the omitted party, and further alleges that such party is within the jurisdiction of the court. At least this was the rule at common law, applying to the non-joinder of jointly interested defendants; for it was required that the defendant attempting to abate the suit for any such defect of parties should "give to the plaintiff a better writ," and that was the only way of making compliance with the rule. But the plea in question went to the other extreme, and undertook to show that defendant John M. Camp was a non-resident and that the court under no circumstances could force him to make defense in the cause. We questioned below, and we questioned here, the right or propriety of such an objection upon the part of the defendants, P. D. and P. R. Camp, where the plea of John M. Camp went not to the jurisdiction of the court, but to the privilege merely of his being sued in the district of his residence, and where the right to that privilege was undetermined. The co-defendant, as he had a perfect right to do, might decide at any time to voluntarily submit himself to the jurisdiction of the court, waiving any exemption he might be entitled to claim. If it should have been determined that his plea of privilege was well taken and the court had also found the fact to be that he was an "indispensable party," it would then have been sufficient for the other defendants to protest against the further maintenance of the action; for the absence of an indispensable party is a defect that can be taken advantage of at any stage of the proceeding, and at first instance even on appeal. We submit, therefore, that the plea was wholly without merit, coming at the time that it did.

But supposing that the plea of the two defendants was proper, it certainly cannot be contended that John M. Camp was a party whose interest was so indissolubly connected with that of his co-defendants that in his absence the action

could not have proceeded against them. There is no doubt but that the court would have required him to be brought in, if he had been omitted and it had been suggested that he was within the jurisdiction of the court; but the mere fact that he has an interest in the subject-matter of the action and is jointly liable with his co-defendants does not signify that his interest is inseparably bound up with theirs. Their liability is not dependent upon his; nor does their liability rest for its legality and enforcement upon any right existing in favor of the plaintiff as against him which must first be established. The rights of all of the parties spring from one and the same agreement and the liabilities of all of them are measured thereby. A defense available to one is available to all, and if not available to all it cannot be asserted. The purpose to be accomplished by requiring a joinder of all of the obligors in a case of this kind is the same in law as in equity, viz: the prevention of future litigation, and the doing of complete justice in one action.

If it is true, as contended, that John M. Camp is an indispensable party to this cause and that he cannot be coerced to answer the plaintiff in the Eastern District of Virginia, then it would be impossible for the plaintiff to ever litigate his rights growing out of this controversy in any Federal court, unless he should be able to find all of the defendants at one time in the district of his own residence and there serve them with process—a contingency which the most sanguine suitor could neither reasonably hope for nor await. If it were possible for us to view this case by focusing our attention upon it through section 51, to the exclusion of everything else written in the Judicial Code, then we might be able to acquiesce in the doctrine which the defendants undertake to maintain. But we know that a privilege conferred by law may be controlled in its exercise, restricted in its effect, or entirely abrogated by the same authority that gave it birth. A field of operation is provided for both section 50 and section 51 of the Judicial Code, and the one is not to be given effect to the exclusion of the other, as op-

posing counsel would have us do. It is the policy of the law to insure to parties litigant the right of access to the Federal courts for determination of their controversies where diverse citizenship exists and the requisite amount is involved; and we do not believe that the jurisdiction of those courts should be made to rest upon so precarious a footing as that for which opposing learned counsel contend.

Since (without reference to the exemption claimed) John M. Camp was in nowise an indispensable party to this action, since the necessary diversity of citizenship existed between the plaintiff and the remaining defendants, and since the requisite amount was involved, the plea of the defendants, P. D. and P. R. Camp, was properly stricken.

THE DISTRICT COURT HAD UNQUESTIONABLE JURISDICTION OVER JOHN M. CAMP—HE WAS NOT ENTITLED TO THE EXEMPTION CLAIMED.

The remaining question presented upon the pleadings is whether John M. Camp, a citizen and resident of the State of North Carolina, co-obligor with the defendants P. D. and P. R. Camp, citizens and residents of the Eastern District of Virginia, having been found and served with process in said district, could be lawfully held to answer the plaintiff there, where the suit was brought, or should the action have abated as to him?

The answer to this is contained in the act of February 28, 1839 (now section 50 of the Judicial Code), which we have already quoted in full, and which we request the court to read again in this connection.

It is our contention that under the provision of this section of the Judicial Code, if action is brought by a citizen of one State against several defendants, who are citizens of different States from that of the plaintiff, and the action is prosecuted in the district of the residence of some of the defendants, then, although the remaining defendants are cit-

izens and residents of a State or States other than that in which the suit is brought, *if they are found and served with process within the jurisdiction of the forum selected by the plaintiff*, they are bound by that service and by the judgment or decree thereafter pronounced by the court in that cause.

In advancing this contention we do not overlook section 51 of the Judicial Code, which in terms provides that * * * "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." This section of the Code comes from the act of March 3, 1875, as amended by the act of August 13, 1888, which amended act superseded section 739 of the Revised Statutes; and the section, as it now stands, is traceable through various changes and enactments back to the original judiciary act of 1789.

See act of September 24, 1789, ch. 20, 1 Stat. L., 79.

At the time of the decision in the case of Clearwater *vs.* Meredith *et al.*, 16 L. Ed., 201 (see pages 10 and 11, *supra*), the law provided that no civil action should be brought against an inhabitant of the United States, by any original process, "in any other district than that whereof he is an inhabitant, *or in which he shall be found at the time of serving the writ.*" And the words just quoted, or their equivalent, seem to have been continued in force and operative until the act of March 3, 1887, ch. 373, section 1, was "corrected" by the act of August 13, 1888, ch. 866, section 1, at which time the quoted provision was modified into its present form, the words "or in which he shall be found at the time of serving such process or commencing such proceeding" being omitted therefrom.

It seems clear, therefore, that at the time the act of February 28, 1839, was passed, there was a provision of the law which permitted suit to be brought or an action to be maintained against a defendant in the district where such defendant *was found*. At any rate, this was the law when the

act in question came up for construction, together with the 11th section of the then Judiciary Code, before the Federal Supreme Court in the case of Clearwater *vs.* Meredith *et al.*, mentioned above. It is only reasonable to suppose that when the act was carried into law Congress intended it to conform to the then existing provisions of the judiciary act under which it was to become operative. This is the only explanation which can be offered for the presence in the act of 1839 of the words "*nor found within the district in which the suit is brought,*" and the subsequent expression, "*nor found within the district, as aforesaid.*" These words Congress did not see fit to eliminate at the time it passed the corrected act of August 13, 1888. Nor was any modification or omission of them made at the time of the general revision, when Congress had the whole subject-matter before it, in 1911, and gave to us in the act of March 3 of that year, our existing Judicial Code. In view of this action of the Congress, the words, "nor found within the district in which the suit is brought," appearing in section 50 of the Judicial Code, are not to be slighted or ignored. Their presence means something, and it is the duty of the court to make them effective. What construction, then, is to be given them? It seems clear to us that when Congress continued them in force, it meant to bring forward with them so much of the existing law as was necessary to make them operative; that in cases where the action or suit was against *several defendants,* one or more of whom were not residents of the district where the suit was brought, the court nevertheless acquired proper jurisdiction of such non-resident defendants *if they were found within its jurisdictional limits and served with its process.* What other meaning could be given equally explanatory of the situation presented here? Does not the act, though in negative language, clearly provide that the judgment or decree in such cases shall be conclusive on all parties regularly served with process or voluntarily appearing to answer in the cause? This is unquestionably the con-

struction which must be given the section in question where the action is local.

Ober *vs.* Gallagher, 23 L. Ed., 829; text, p. 831.

And since the effect of the statute, section 51 of the Judicial Code, relied upon by the defendants is not to raise a barrier against the jurisdiction of the court, but only to confer a personal privilege upon the person sued,

Interior Const. & Imp. Co. *vs.* Gibney *et al.*, 40 L. Ed., 401;

Central Trust Co. *vs.* M'George *et al.*, 151 U. S.; 36 L. Ed., 98; text, p. 100,

we respectfully submit that jurisdiction in cases of this kind is not only desirable in so far as the non-resident defendant is concerned, because it would facilitate the administration of justice by affording a full and complete remedy in one action, but the retention of jurisdiction in such cases is authorized and contemplated under the provisions of existing law. The only effect of such rule is to exclude the plea of privilege in an insignificant number of cases, but yielding a vast amount of benefit in return therefor.

The situation would be entirely different if the plaintiff and John M. Camp were the only parties litigant. In such case the action could not be maintained in the District Court for the Eastern District of Virginia, although John M. Camp had been found and served with process there, unless, of course, John M. Camp consented to suit in that district. This is the spirit of section 50 of the Judicial Code.

See So. Pac. Co. *vs.* Denton, 146 U. S.; 36 L. Ed., 942.

In that section "inhabitant" means nothing more than citizen," but was used, as is explained in *Ex parte* Shaw, "to avoid the incongruity of speaking of a citizen of anything less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in one State."

Ex parte Shaw (*s. c.*, Shaw *vs.* Quincy Mining Co.), 145 U. S., 444; 36 L. Ed., text, p. 770.

Opposing counsel are in error, therefore, when they undertake to give the court the impression that our contention is that mere residence within a district is sufficient to confer jurisdiction upon the Federal court over a defendant found and served with process there, where the plaintiff is a citizen and resident of a State other than that where the suit is brought, for in such case the suit would not be brought in the district whereof either the plaintiff or the defendant was "an inhabitant." And counsel are again in error when they say that in the case of Ladew *vs.* Tenn. Copper Co. (218 U. S., 357) the action was against more than one defendant, "the other defendants being *residents* of the district in which the suit was brought." That was an injunction proceeding brought by certain citizens of the States of New York and West Virginia in the Circuit Court for the Eastern District of Tennessee against Tennessee Copper Company, a New Jersey corporation, and Ducktown Sulphur, Copper & Iron Company, a British corporation. Corporations "*reside* at home, but do business abroad."

> See *Ex parte* Shaw, 36 L. Ed. (U. S.), text, top of p. 772.

In the Ladew case, just mentioned, it was held that although Tenn. Copper Co. had its "chief office and place of business in Polk County, Tennessee, within the territorial jurisdiction of the circuit court," it was not an "inhabitant" of the district in which the suit was brought, and therefore could not, over its objection, be compelled to answer the complaints there.

A similar situation was presented in *Ex parte* Weisner, also cited by opposing counsel. That was an original proceeding before the Federal Supreme Court for a writ of mandamus to the Federal Circuit Court of Missouri to require it to remand a cause which had been removed to it from the State court. The cause was commenced by Wisner, a citizen of Michigan, in the State circuit court, against Beardsly, a citizen of Louisiana. The case was removed on the petition

of Beardsly. The Supreme Court held that the Federal circuit court could not entertain jurisdiction over the case against the consent of the plaintiff, and recognized the rule laid down in Central Trust Co. *vs.* M'George, heretofore cited in this brief.

Other cases cited and relied upon by opposing counsel may be readily distinguished from the instant case, and a detailed examination of them could hardly prove profitable in a written argument.

Here there was unquestioned jurisdiction as between the plaintiff and the defendants P. D. and P. R. Camp, for the requisite amount in value was involved and the action was brought by a citizen of Florida in the Eastern District of Virginia, of which district the said P. D. and P. R. Camp were and are "inhabitants." If there had been any serious question as to the remaining defendant, the learned district judge would have readily dismissed as to him, for, as we have pointed out, he was in no sense an indispensable party to this action. But the lower court are eminently correct in holding that the defendant John M. Camp, having been "found within the district in which the suit" was brought, within the meaning of section 50 of the Judicial Code, and therefore liable to be "concluded" by such judgment as might thereafter be pronounced in the cause, should be compelled to answer the plaintiff upon the merits. It was to the interest of his codefendants as well as of the plaintiff that he should be retained, for he would be liable in contribution to his co-obligors if upon a separate suit against them they should be compelled to discharge the plaintiff's claim. The quoted provision, "or found within the district in which the suit is brought" means today just what it meant when the Judicial Code provided that actions might be brought against a defendant in the district whereof "he is an inhabitant or in which he shall be found at the time of the serving of the writ," as we have already pointed out;

See Clearwater *vs.* Meredith (*supra*);

and the objection raised by John M. Camp was therefore properly resolved against him. Not being exempt from suit in the district in which he was "found," the district court could not do otherwise than overrule his plea. We respectfully submit that the "question of jurisdiction" presents no error to this court.

The Case on its Merits.

The parties to this action, plaintiff and defendants, entered into a contract of date August 18, 1913, whereby they agreed to secure a charter for and organize a joint-stock company, to be known as Levy County Lumber Company. The corporation so formed was to have a capital stock of $9,000.00, and when organized such stock was to be divided in the proportion of $2,500.00 to Gress and $6,500.00 to the Camps, in consideration of which Gress was to convey to the new corporation a certain mill plant located at or near Jacksonville, Florida, and the Camps were to convey certain timber rights located in Levy County, Florida, conveniently near the mill plant. The respective values of the two properties were $125,000.00 for the property to be conveyed by Gress and $325,000.00 for the property to be conveyed by the Camps. In paragraph 2 of the contract containing the description of the property to be conveyed to the new corporation by Gress there occurs this statement:

> "It being understood that the title to the said mill plant and property is now in Morgan Lumber Company, which will make a conveyance to the Levy County Lumber Company."

The record shows a full compliance with the terms of the contract on the part of Gress and a failure and refusal to comply on the part of the Camps. The breach of the contract by the Camps being practically admitted, the single question for the decision of the jury was the amount of damages sustained by Gress through the breach of the contracts

by the Camps. It was shown in the evidence of the plaintiff that, relying upon the contract, he had sold a large tract of valuable timber adjacent to the mill, and which had been purchased to be cut by it, and that after the sale of this property, there was little or no other timber within cutting distance of the mill to make the latter a profitable investment. It was further shown that the value of the mill as estimated in the contract was its true value as of the time of the contract, but that after the refusal of the Camps to form the new corporation, and thereby join together the mill and timber, and by reason of the impossibility of obtaining a contiguous marketable supply of standing timber, the mill was no longer valuable as a going concern, and was worth practically only the amount that it would bring as a wrecking proposition. It was therefore insisted by the plaintiff that an element of damages recoverable in the action was the depreciation of the value of this property sustained by the breach of the contract. On the other hand, it was and is contended by the defendants that since the title to the mill was not in Gress, but in the Morgan Lumber Company, the former could not claim the depreciation sustained in the mill property as a recoverable item of damages in an action instituted by him on the contract. In his evidence-in-chief the plaintiff, Gress, in order to show his ability to comply with the contract made by him, introduced (Record, p. 29) a copy of the minutes of a meeting of the Board of Directors of the Morgan Lumber Company, as follows:

> "A contract entered into between M. V. Gress, representing the Morgan Lumber Company, and P. D. Camp, representing the Camp Manufacturing Company, of Franklin, Va., dated August 18, 1913, whereby M. V. Gress agrees for the Morgan Lumber Company to the formation of a new corporation, to be known as the Levy County Lumber Company, capital $9,000.00; of which M. V. Gress, representing the Morgan Lumber Company, receives $2,500.00 stock valued at $125,000.00 for the Morgan Lumber Com-

pany's sawmill plant, located naer Ortega; and P. D. Camp, representing the Camp Mfg. Company, receives $6,500.00 of the stock of the Levy County Lumber Company for timber holdings of the Camp Mfg. Company in Levy County, Florida; estimated amount of timber on land 140,000,000 ft. Furthermore, the Levy County Lumber Company is to pay to M. V. Gress, for Morgan Lumber Company, a rental of $375.00 per month for the use of the land on which the mill is located, so long as needed for that purpose, etc.

"Now, then, be it resolved, that the directors of the Morgan Lumber Company do hereby approve the said contract in its entirety."

The contract between Gress and the Camps was under SEAL.

Summarized, therefore, the situation is that Gress individually entered into a sealed contract with the Camps, whereby he agreed to convey to a corporation to be formed, at an agreed price, a certain sawmill property. The contract so made was breached by the Camps. Action on the contract was brought by Gress individually against the Camps, and evidence introduced and not denied of the making of the contract, the ability of Gress to carry out his part, the loss sustained, and the breach by the Camps, and one of the questions for the determination of this court is, May Gress recover in this action the depreciation in the property, which under the terms of his contract he was to exchange for stock in the new corporation, notwithstanding the title to the property was in a corporation, or recover the decreased value of his proportion of stock in the new company which was never organized?

In the course of the trial it was shown that Gress owned the entire capital stock of the Morgan Lumber Company. Many cases are cited in the brief of counsel for the plaintiffs in error to show that a stockholder of a corporation may not maintain in his own name an action for the benefit of the

corporation; in other words, that a wrong committed against the corporation must be prosecuted in its own name. Giving to these decisions the widest possible latitude, it is respectfully insisted that they have no application to the facts in this case. In each such case the right sought to be asserted was a right which accrued to the corporation in its corporate capacity and as to which there was no privity between the stockholder attempting to assert such right and the defendant who had committed the wrong, and in each such case the right asserted was one which could be and could only be asserted by the corporation itself. The differences between these cases and this are apparent at a glance In this case there was no privity between the corporation and the Camps, and, the contract here being a sealed instrument, the *Morgan Lumber Company, even if it be admitted to have been the undisclosed principal, could have maintained no action on it.*

The plaintiffs in error insist that "the vital question presented by the record is whether a plaintiff, suing in his individual right, can recover damages caused by depreciation in value of the property of a corporation of which corporation he owns the entire capital stock."

To which we reply:

First, The verdict and judgment may be sustained upon the theory that the injury suffered by the defendant in error was for depreciation in the value of *his stock in Morgan Lumber Company* or his stock in the proposed company, which was never organized; and, he being the owner of the *entire stock* in that company, it follows that the depreciation in the value of his stock interest in the corporation was illustrated by the depreciation in the value of the properties of the corporation.

Again, Gress' loss was the difference between the value of the stock which he would have received in "Levy Lumber Company" and the value of the stock in Morgan Lumber Company as diminished by the respondent's breach of their contract.

Second. The defendant in error (*Morgan vs. Gress*) made a contract; he made it under seal. At common law he was the *only party* who could sue and recover damages for its breach. Even if, under the present state of the law, he is not the *only party* who could sue on a contract under seal, he is undoubtedly a proper party authorized to sue.

Under an abundance of authority, it may be safely asserted that Gress was the proper party plaintiff in this action for a breach of the contract; and we further insist that, if in the trial it appeared that in the making of the contract he acted for an undisclosed principal, that fact will neither bar the action nor change the measure of damages.

In Virginia and in the Federal court it has been so frequently held, as not to require citation, that where an agent is contracted with by deed in his own name his principal cannot sue upon it (Dicey on Parties, p. 134, and cases cited; Storey on Agencies, sec. 422; *Portsmouth vs. Oliver Co.*, 109 Va., 513; *Willard vs. Wood*, 135 U. S., 309).

It is equally well established that where a contract *not* under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it (*Portsmouth vs. Oliver*, 109 Va., 513; 3rd Rob. Prac. (new), 34). In either aspect, therefore, whether the contract be a sealed or unsealed instrument, Gress was the proper party plaintiff.

And there is nothing in section 2415 of the Virginia Code which affects this right. The section provides that if a covenant or promise be made for the sole benefit of a person with whom it is not made, such person may maintain in his own name any action thereon which he might maintain in case it had been made with him; but it has been held in Virginia that this statute does not enable one who is not himself a party to a deed or to a contract under seal to maintain an action thereon unless he is plainly designated by the instrument as the beneficiary and the covenant or promise is made for his sole benefit (*Newberry Co. vs. Newberry*, 95 Va., p. 120). If, therefore, it be true, as it needs must be,

that Gress was, under the circumstances here, the proper party plaintiff, can it be contended that the undisclosed principal, if this court should be of opinion that the contract was made by Gress as the agent of the Morgan Lumber Company, should be denied the privilege of recovering damages actually sustained by the breach of a contract made for its benefit? We insist that the correct interpretation of the law is that laid down in section 2048 of Mechem on Agency, second edition, where the author says:

> "Where the action is brought by the agent upon the contract which he has made, he may, unless the principal intervenes, recover the full measure of damages for its breach, in the same manner as though the action had been brought by the principal."

Under such circumstances, the author says the court would treat the recovery as made for the benefit of the principal.

A case in point is *Shelby vs. Burrow* (Ark.), 89 S. W., 464. In that case Burrow contracted in writing with Shelby for the purchase of 100 bales of cotton. At the time the contract was entered into no principal was disclosed to Shelby, and the latter thought and believed he was selling the cotton to Burrow personally. Shelby failed to deliver the cotton and Burrow brought his action to recover damages sustained in the non-performance. It developed that Burrow was acting as agent for the Moose Gin Company, and the damages sustained were sustained by the latter company. Shelby insisted that this made the contract void and that Burrow could not maintain the action. Answering this contention, the court said: "He (the agent) can sue upon the contract, and can, unless the principal intervenes, recover the full measure of damages for its breach, in the same manner as though the action had been brought by the principal," citing Mechem on Agency, sections 755-763; Clark & Skyles on Law of Agencies, pp. 1331-1341. It was therefore held that, notwithstanding Burrow was merely the agent

and the damages were sustained by his principal, that he might sue and recover just as fully as his principal could have recovered if the contract had been made with the latter.

In the case of *National Bank vs. Nolting,* 94 Va., 263, a suit was brought by W. O. Nolting against the National Bank of Virginia. In the trial Nolting testified that he was the cashier of Davis & Gregory, and that Davis & Gregory were the real plaintiffs and entitled to the recovery sought to be obtained in the case. The suit was to recover a balance claimed to be due to Davis & Gregory from the bank, withheld by reason of the payment by the bank of a check claimed to have been illegally raised. After the evidence recited above was introduced, the defendant moved to dismiss the case, because it had been brought in the name of the wrong plaintiff; but the court below allowed a recovery.

The Virginia Court of Appeals in passing on the objection to the form of action said:

> "The plaintiff, in keeping the account with the defendant, and in bringing suit to recover the alleged balance, was acting as agent, and it is well settled that where a contract not under seal is made with an agent, and in the agent's name for an undisclosed principal, either the agent or principal may sue upon it."

In the case of *Carter vs. Southern Railway Co.* (Ga.), 36 S. E., 308, which was an action for damages resulting from a breach of contract for a shipment of merchandise, the action was brought in the name of an agent, the evidence in the trial developing the fact that the goods belonged to the wife of the plaintiff. The lower court, upon motion of defendant, granted a non-suit, on the ground that the damages sustained accrued not to the plaintiff, but to his wife, and that she and not he was the proper plaintiff. The Supreme Court of Georgia in reversing the action of the lower court said:

> "The courts of both this country and England are now, with a few exceptions, all agreed that, where

> the consignor makes a contract of shipment with the carrier, he may bring an action for loss of or injury to the consignment, although he may not be the actual owner of the property. In such a case the privity of contract between the carrier and the consignor is a sufficient foundation on which to base the action. It is also well settled by the authorities that where a consignor, who is himself not the real owner, recovers damages from the carrier for a breach of the contract of carriage, the recovery inures to the benefit of the owner, and the consignor is regarded simply as the trustee of an express trust."

The case of *Simons vs. Witner* (Mo.), 88 S. W., 791, is illustrative of the point now being made. There the action was for damages alleged to have accrued to the plaintiff by reason of defendant's breach of a contract to erect a building. The contract was in writing, but not under seal. The evidence disclosed the fact that the land on which the buildings were to be erected belonged to the wife of the party in whose name the contract was made, and that the contract was made for her benefit and the buildings when erected were to be paid for by her. It was contended by the defendant that, inasmuch as the wife of the plaintiff owned the land upon which the buildings contracted for were to be erected, any damages resulting from a breach of such contract would be damages accruing to her and not to the plaintiff. The court, after quoting the Missouri statute, in which a husband is declared under certain circumstances to be the agent of his wife, held that, entirely aside from the statute, an agent of an undisclosed principal might maintain a suit of this character in his own name, and that damages sustained by the owner could be recovered by the agent, who would be treated as the trustee of the undisclosed principal.

We respectfully insist that in principle there is no difference between the recovery sought in that case, or the element of damages asserted, than in the instant case, admitting the position taken by the plaintiff in error, that Gress

was in fact an agent and not the principal, to be true and established.

Substantially the same point was decided by the Supreme Court of Georgia in the case of *Groover vs. Warfield*, 50 Ga., 645. In that case the agent of the owner sold a large quantity of cotton at an agreed price; the contract was broken by the purchaser, and suit was instituted by the agent to recover the difference in the selling price and the value as of the agreed date of delivery. The point was made that, since the damage accruing was not sustained by the agent, he could not maintain a suit for this damage in his own name; and the trial court so decided, holding that the agent could recover only the amount of the commissions which he would have earned if the contract had been completed. The Supreme Court of Georgia, reversing the action of the lower court, held that where an agent sells cotton consigned to him, he may in his own name recover the damages resulting from a breach of the contract by the buyer, although he may be bound to pay over the same, when recovered, to the owner of the cotton.

It is, for the reasons stated above, insisted:

First, that the judgment of the lower courts should be affirmed upon the theory that the pleadings and proof established the interest of the respondent in the stock representing the properties of Morgan Lumber Company; the depreciation in the value of the properties of that corporation occasioned by a breach of the contract sued on and corresponding diminution in the value of the stock of Morgan Lumber Company, held and owned in its entirety by the defendant in error, and the reduced value of respondent's stock in the proposed corporation. This view of the case can be taken without controverting the argument or authorities relied on by the appellants. The declaration filed in the case did not attempt to argue the case, but stated the facts, including the statement of the depreciation in the value of the properties of the corporation and the ownership of all the stock

by the defendant in error. The presumptions are all in favor of the validity of the verdict and judgment, and if, therefore, there is any theory upon which it can be sustained applying the pleadings to the proof, it ought not to be set aside.

If, however, it cannot be fairly said that one of the elements of damages of the defendant in error was the depreciation in the value of his stock, representing the properties of Morgan Lumber Company, we confidently insist, second, that the contract in question, having been made by the defendant in error and *made under seal,* and apparently made in the interest and in behalf of Morgan Lumber Company, was a contract on which the defendant in error could have sued in his own name; and perhaps, as under the common law rule, was the only party who could have maintained the suit, and that the recovery should and must include such damages as were shown to have been sustained by that company by means of the wrongful breach of the contract.

The suggestion in the brief of counsel for petitioner that, even if this be true, Gress is entitled to recover only so much of this depreciation as his interest in the new company bears to the whole, is so patently without merit that it is almost idle to discuss it. The plant which Gress was to put into the new corporation was shown by the evidence to be worth $125,000.00 from the day of the contract to the day of the breach, and it was the breach of the contract—*i. e.,* the refusal of Camp to form the new corporation, whereby the plant would have been coupled up to a valuable piece of timber—that caused the damages. Gress himself, as the owner of all the stock of the Morgan Lumber Company or as the owner of the fee in the properties, sustained the damage and all the damage; and, since the intent of the law under such circumstances is to make the injured party as nearly whole as is susceptible through damages, to charge him with a part of his own loss is, to say the least, a remarkable proposition, sustained by neither reason nor authority.

A general view of the entire case discloses the following: The subject-matter and terms of the contract were clearly shown, for the contract sued on was in writing and under seal and not controverted. The breach of the contract is positively established by the testimony of the plaintiff on the trial, strongly corroborated by the correspondence passing between the parties, and embodied in the transcript of the record, and finally established and confirmed by the admission of one of the defendants, P. R. Camp, who testified (p. 57, Record), referring to himself and his codefendants, in a conference with Morgan V. Gress at Franklin, Virginia: "They told Mr. Gress that they would not carry out that contract." It may reasonably have been assumed, and it was clearly established that there was heavy depreciation in the property and interests proposed to be contributed by the plaintiff Gress in the organization of the Levy County Lumber Company; and on the *other hand there was an admitted enhancement in the value of the properties* which the Camps contracted to convey to the Levy County Lumber Company, but which, contrary to their engagement, they sold at an advanced value and pocketed the profit. Gress was always willing and anxious to do and have done everything required of him by the contract.

It may again be observed in this connection that there was ample evidence to justify a finding by the jury that the interest of Morgan V. Gress in the enhanced value of the Camps' timber holdings amounts to *more than the verdict rendered in this case.*

The petitioners were fully advised as to the exact interest of the respondent in the properties which were the subject of the contract. They were undoubtedly answerable to *him* and he to them for all damages resulting directly from a breach of that contract.

W. M. TOOMER,
D. LAWRENCE GRONER,
Counsel for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917

P. D. CAMP, P. R. CAMP AND JOHN M. CAMP,
Petitioners,

vs.

MORGAN V. GRESS, Respondent.

BRIEF OF RESPONDENT'S COUNSEL IN OPPOSITION TO THE PETITION FOR THE WRIT OF CERTIORARI.

The petition presented here does not show that any question of great public interest is involved, nor any positive and direct conflict between the decision complained of and similar decisions by Federal courts of equal rank. Decisions cited by petitioners' counsel as being opposed to the decision of the Circuit Court of Appeals in this case will be found to have been made without taking into consideration Section 50 of the Judicial Code, or that the cases in which those decisions were made presented a different state of facts from that which formed the basis for the judgment rendered here.

We also direct particular attention to the following:

First: That the judgment complained of is against *three* defendants, (individuals).

Second: The question of personal exemption from suit raised by the petitioners relates to *one defendant,* John M. Camp. As to the other two defendants no question of this character, worthy of any consideration, is presented; and indeed, as to the two defendants, P. D. Camp and P. R. Camp, such question may be treated as abandoned.

Third: The trial court's jurisdiction over the defendant John M. Camp is established by the statute, the conclusions and the reasoning advanced by *Mr. Justice Woods,* delivering the opinion of the Circuit Court of Appeals for the Fourth Circuit in the pending case, and by the authorities submitted herewith.

Fourth: Even if the alleged "jurisdictional question" presented by the petitioner John M. Camp merited further consideration by this Court, there is no reason why enforcement of the final judgment against the defendants P. D. Camp and P. R. Camp should be suspended pending the decision on the question of jurisdiction as to John M. Camp.

We submit the following brief on the so-called "jurisdictional question" and the alleged error touching the correct rule for the ascertainment of the plaintiff's damages, inviting attention to the fact that the contract sued on was in writing and not controverted, and that its breach was substantially confessed in the evidence.

This action was commenced in the District Court for the Eastern District of Virginia, by Morgan V. Gress, a resident and citizen of the State of Florida, as plaintiff, against P. D. Camp, P. R. Camp and John M. Camp, who were alleged to be citizens and residents of said District, as defendants, to require them, as joint obligors, to respond in damages to the plaintiff for the breach of a con-

tract executed between them. Service of process was made upon P. D. and P. R. Camp and the remaining defendant accepted service for himself.

John M. Camp protested the jurisdiction of the court over his person by plea, wherein he claimed himself to be a resident and citizen of the State of North Carolina, and asserted that, as to him the action was not brought either in the district of the residence of the plaintiff or of the defendant. His plea was an effort simply towards securing exemption from suit except in the district of his own residence.

P. D. and P. R. Camp are admittedly citizens and residents of the Eastern District of Virginia, but conceiving the action to be of such a nature that the presence of every one of the defendants was necessary to the maintenance of it in any court, they also filed a plea reiterating the objection presented by their co-defendant, John M. Camp, and undertook to oust the jurisdiction of the court as to themselves should the plea of the defendant, John M. Camp, prevail.

The question presented by these pleas was two-fold:

Firstly, supposing that John M. Camp could not be compelled to defend in this proceeding owing to the personal privilege asserted by him of being sued only in the district of the residence of either himself or the plaintiff, was he an "indispensible party" in whose absence the court could not proceed to final judgment as against the remaining defendants over whom the jurisdiction of the District Court had otherwise properly attached? And secondly, under the facts presented by this case, could John M. Camp, who claims to be a resident and citizen of the State of North Carolina, successfully assert the privilege

of being sued only in the district of the residence of either himself or the plaintiff?

JOHN M. CAMP WAS NOT AN INDISPENSIBLE PARTY DEFENDANT TO THIS CAUSE.

Who is an indispensible party? What is the nature of the right which determines the character of a party as being either formal, necessary or indispensible? Does this right arise arbitrarily, or is it dependent upon the circumstances of the particular case before the court? These questions are answered in the following authorities:

> "The court here points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensible parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

SHIELDS et al. v. BARROW, 7 How. 130; 15 Law ed. 158, text, page 160.

> "The learning on the subject of parties to suits in

chancery is copious, and within a limited extent, the principles which govern their introduction are flexible. There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such, that if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties if within its jurisdiction before deciding the case. But if this cannot be done, it will proceed to administer such relief as may be in its power, between the parties before it. And there is a third class, whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to the jurisdiction."

BARNEY v. BALTIMORE, 6 Wall. 280; 18 Law ed. 825, text, page 826.

(After citing Section 737 of the Revised Statutes of the United States—U. S. Compl. Stat. 1901, p. 587—the substance of which is now embraced in Section 50 of the Judicial Code, and also referring to the 47th equity rule, to the like effect, the United States Supreme Court, in another case, says):

"This statute and rule permit the court to proceed with the trial and adjudication of the suit, as between parties who are properly before it, and preserves the rights of parties not voluntarily appearing, providing their rights are not prejudiced by the decree to be rendered in the case. * * * This rule does not permit a Federal court to proceed to a decree in that class of cases in which there is an absence of indispensible, as distinguished from proper, or

even necessary, parties, for neither the absence of formal, nor such as are commonly termed necessary, parties, will defeat the jurisdiction of the court; provided, in the case of necessary parties, their interests are such and so far separable from those of parties before the court, that the decree can be so shaped that the rights of those actually before the court may be determined without necessarily affecting other persons not within the jurisdiction. After pointing out that there may be formal parties, of whose omission the court takes no account, Mr. Justice Miller, in delivering the opinion in *Barney v. Baltimore,* 6 Wall. 280, 18 L. ed. 825, went on to say:

" 'There is another class of persons whose relations to the suit are such, that if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties, if within its jurisdiction, before deciding the case, but, if this cannot be done, it will proceed to administer such relief as may be in its power between the parties before it. And there is a third class whose interests in the subject-matter of the suit and in the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction.'

"The relation of an indispensible party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of such absent party. 1 Street, Fed. Eq. Pr. Sec. 519.

"If the court can do justice to the parties before it without injuring absent persons, it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape

its decrees so as to do justice to those made parties, without prejudice to such absent persons. *Payne v. Hook,* 7 Wall. 425, 19 L. ed. 260."

WATERMANN v. CANAL-LA. BANK & TRUST CO. et al. 215 U. S. 33; 54 L. ed. 80, text p. 86.

And for a thorough discussion of the same subject, with citations of authorities, see

ROSE'S CODE FED. PRO. Vol. I. Sec. 817, et seq.

Helpful, also, by way of illustration, in determining who is a formal, necessary or indispensible party, are the following cases which were considered by the court below:

Farni et al. v. *Tesson,* 1 Black. 309, 17 L. ed. 67.
Riddle & Co. v. *Mandeville et al.,* 5 Cranch 322, 3 L. ed. 114, text p. 117.
Russel v. *Clarke's Execr. et al.,* 7 Cranch 69, 3 L. ed. 271, text p. 281.
Marshall v. *Beverly,* 5 Wheat. 313, 5 L. ed. 97.
Conn. et al. v. *Penn.,* 5 Wheat. 424, 5 L. ed. 125.
Harding et al. v. *Handy et al.,* 11 Wheat. 103, 6 L. ed. 429.
Mallow et al. v. *Hinde,* 12 Wheat, 193, 6 L. ed. 599.
Bank v. *R. R. Co.,* 11 Wall. 624, 20 L. ed. 82.
Ribon v. *R. R. Co.,* 16 Wall. 446, 21 L. ed. 367.
Bank v. *Campbell,* 14 Wall. 87, 20 L. ed. 832.

It is evident from a perusal of the foregoing authorities that the question as to the joinder of parties in many cases is one which addresses itself to the discretion of the court under the circumstances of the particular case before it. The prevailing rule has been stated as follows:

"However numerous the persons interested in the subject of a suit, they must all be made parties plaintiffs or defendants, in order that a complete de-

cree may be made; it being the constant aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of a suit to make the performance of the order perfectly safe to those who have to obey it, and to prevent future litigation." And again, 'all persons are to be made parties who are legally or beneficially interested in the subject-matter and result of the suit,' extending in most cases to heirs-at-law, trustees and executors."

CALDWELL v. TAGGART et al., 4 Peters 190, 7 L. ed. 828, text, page 832.

But, to this general rule, there were always well recognized exceptions, as where the party not joined was a necessary, as distinguished from an indispensible, party, and was beyond the jurisdiction of the court, or where his interest was merely nominal, or his joinder, if made, would oust the jurisdiction of the court as to the parties before it. The propriety of requiring the joinder of an omitted party is oftentimes a question of expediency in the administration and furtherance of justice; and a reading of the adjudicated cases will show the flexibility of the general rule:

Mallow et al. v. *Hinde*, 12 Wheat. 193, 6 L. ed. 599, text page 600.

Omaha Hotel Co. v. *Wade et al.*, 7 Otto 13, 24 L. ed. 917, text p. 919.

Mandeville v. *Riggs*, 2 Peters 482, 7 L. ed. 493, text, page 494.

See also:

Harding v. *Handy et al.*, 6 L. ed. 429.

Cameron v. *McRoberts*, 3 Wheat, 591.

Simms v. *Gutherie*, 3 L. ed. 642.

Having considered the question as to parties, the necessity for their joinder and the reasons excusing their omission, we come now to the more important point as to what effect the enactment known as the Act of February 28, 1839, (now section 50 of the Judicial Code), had upon the procedure in the respective courts of equity and those pursuing the course of the common law. The section in question reads as follows:

> "Sec. 50. When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district as aforesaid, shall not constitute matter of abatement or objection to the suit."

The Court in the case of *Shields et al. v. Barrow*, writing to the point which we have just suggested, in so far as the equity procedure is concerned, says:

> "The act relates solely to the non-joinder of persons who are not within the reach of the process of the court. It does not affect any case where persons, having an interest are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and so far as it touches suits in equity, we understand it to be no more than a legislative affirmance of the rule previously established by the cases of *Cameron v. McRoberts*, 3 Wheat. 591; *Osborne v. Bank of U. S.*, 9 Wheat. 738, and *Harding*

v. Handy, 11 Wheat. 132. For this court had already there decided that the non-joinder of a party, who could not be served with process, would not defeat the jurisdiction." * * *

SHIELDS et al. v. BARROW, 17 How. 130, 15 L. ed. 158, text, page 161.

The act being merely declaratory of the rule which already prevailed in the courts of chancery in the absence of statute, did not broaden the jurisdiction of those courts; and its principal effect, therefore, was limited to common law cases.

Cladbourne v. *Coe*, 10 U. S. App. 83.
Barney v. *Baltimore*, 6 Wall. 280, cited (*supra*).
Inbusch v. *Farwell*, 1 Black, 566.
Cameron v. *McRoberts*, 3 Wheat. 591.
Osborne v. *Bank*, 9 Wheat. 738.
Harding v. *Handy*, 11 Wheat. 132.
Blume, etc., v. *Baldwin*, 87 Fed. 785.
Gross v. *Geo. W. Scott Mfg. Co.*, 48 Fed. 35.

The change worked by the Act in cases where the Federal Courts pursue the course of the common law, however, was very material; and especially beneficial were the results that it accomplished. No clearer exposition of this phase of the law has come to our attention than that embodied in the opinion of *Mr. Justice MILLER*, in the case of *BARNEY v. BALTIMORE*. Discussing the question of parties, and after citing the case of *Shields v. Barrow*, 18 L. ed. 825, he says:

"The court there says, in relation to this Act, that 'It does not affect any case where persons having an interest are not joined, because their citizenship is such that their joinder would defeat the jurisdiction,

and so far as it touches suits in equity, we understand it to be no more than a legislative affirmance of the rule previously established by the cases of *Cameron v. McRoberts,* 3 Wheat., 591; *Osborne v. Bank of U. S.,* 9 Wheat., 738; and *Harding v. Handy,* 11 Wheat., 132.' * * * * * The Act says that it shall be lawful for the court to entertain jurisdiction; but as is observed by this court in *Mallow v. Hinde,* 12 Wheat., 198, when speaking of a case where an indispensible party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court;' so that while this Act removed any difficulty as to jurisdiction between competent parties regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. * * * * It remains true, notwithstanding the act of Congress and the forty-seventh rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit, without affecting those rights." *North. Ind. R. R. Co. v. Mich Cent. R. R. Co.,* 15 How., 233.

"These views do not render the Act of 1839 either useless or ineffectual, for while it is true that in reference to parties in chancery proceedings, that Act only pronounced the rule which this court had previously asserted, its beneficial influence in cases of common law cognizance are often called into exercise. *It is a rule of the common law, that where one of the several joint obligors in a contract, whether verbal or in writing, is sued alone, he can plead the non-joinder of the obligors in abatement, and in cases*

where the joint obligors not sued were citizens of the same state with the plaintiff, or were residents of some other district than that where the suit was brought, the jurisdiction of the court was defeated. This very serious difficulty was remedied by the Act of 1839; for in such cases the plaintiff can now prosecute his suit to judgment against any one of such joint obligors, in any district where he may be found. Of this class of cases are *Inbusch v. Farwell*, 1 Black, 566, (66 U. S., XVII., 188), and others which preceded it.

"But this rule does not conflict with that under which the courts of chancery act in refusing to make a decree, where by reason of the absence of persons interested in the matter, the decree would be ineffectual, or would injuriously affect the interest of the absent parties. *In the class of cases, just mentioned, at common law, the plaintiff, by his judgment against one of his joint debtors, gets the relief he is entitled to, and no injustice is done to that debtor, because he is only made to perform an obligation which he was legally bound to perform before. The absent joint obligors are not injured, because their rights are in no sense affected, and they remain liable to contribute to their co-obligor who may pay the judgment by suit, as they would have been had he paid it without suit.*" (The italics are our own).

BARNEY v. BALTIMORE, 6 Wall. 280, 18 L. ed. 825, text, page 826-27.

Controlling as to, and decisive of the character of John M. Camp as a party defendant to this proceedings is the decision in *CLEARWATER v. MEREDITH et al.*, which was an action to enforce a contract of guaranty in writing, brought by the plaintiff, a citizen of Ohio, against Thomas Tyner and Solomon Meredith, citizens and residents of Indiana, together with one Caleb Smith, who, at the time of the commencement of the action was not a citizen of the

State of Indiana, and who, therefore, was not joined as defendant. The action was begun in the Circuit Court for the District of Indiana. The defendants who were served filed a demurrer in which they challenged the jurisdiction of the court, and the demurrer was sustained. Counsel for defendants, in his brief upon appeal, contended that the action was on a joint contract, and that the omission of Smith was fatal to the maintenance of the case. He argued that the rule was that where there are two or more joint plaintiffs or defendants, each of the plaintiffs must be capable of suing and each of the defendants of being sued in order to support the jurisdiction; and that jurisdiction was not disclosed as to the absent defendant. *Mr. Justice MC LEAN*, in considering the defendants' contentions, and in delivering the opinion of the Court, says:

> "If this," speaking of the defendants' demurrer, "be regarded as a plea to the jurisdiction of the court, it is argued that the suit is brought on a joint contract executed by the defendants in error, when only two of them were served with process, and the third one, Caleb B. Smith, who, at the time of the commencement of the suit, was not a citizen of the State of Indiana, and is therefore not joined as a defendant herein, etc.
>
> "The first section of the Act of February 28th, 1839, provides that "where, in any suit at law or in equity commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice

other parties not regularly served with process, or not voluntarily appearing to answer."

"In the case of *The Bank of Vicksburg v. Slocomb*, 14 Pet., 65, it is said the 11th section of the Judiciary Act declares that no civil suit shall be brought, before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

"*It has been held that this is a personal privilege of not being sued out of the district in which the defendant may live, or in which he shall be found on serving the writ, and that it may be waived by the defendant.*" (The Italics are our own). "And it is said, in the above opinion, "that it did not contemplate a change in the jurisdiction of the courts, as it regards the character of the parties, as prescribed by the Judiciary Act, and expounded by this court—that is, that each of the plaintiffs must be capable of suing, and each of the defendants capable of being sued; which is not the case in this suit, some of the defendants being citizens of the same State with the plaintiffs."

"It is well known that the Act of 1839 was intended so to modify the jurisdiction of the circuit court as to make it more practical and effective. Where one or more of the defendants sued were citizens of the State, and were jointly bound with those who were citizens of other States, and who did not voluntarily appear, the plaintiff had a right to prosecute his suit to judgment against those who were served with process; but such judgment or decree shall not prejudice other parties not served with process, or who do not voluntarily appear.

"*Now it is too clear for controversy, that the Act of 1839 did intend to change the character of the parties to the suit. The plaintiff may sue in the circuit court any part of the defendants, although others may*

be jointly bound by the contract, who are citizens of other states. The defendants who are citizens of other states are not prejudiced by this procedure, but those on whom process has been served, and who are made amenable to the jurisdiction of the court." (Italics are ours).

"And in regard to those whose rights are in no respect affected by the judgment or decree, it can be of no importance of what States they are citizens. If one of the defendants should be a citizen of the same state with the plaintiff, no jurisdiction could be exercised between them, and no prejudice to the rights of either could be done.

"The plea to the jurisdiction seems not to be well taken, and it cannot be sustained."

The judgment was accordingly reversed.

CLEARWATER v. MEREDITH, et al. 21 How. 489, 16 L. ed. 201, text. p. 202.

"Jurisdiction in the federal courts is not defeated by the suggestion that other parties are jointly liable with the defendants, provided it appears that such other parties are out of the jurisdiction of the court; but it is expressly provided by the Act of the 28th of February, 1839, that the judgment or decree rendered in the case shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer. 5 Stat. at L. 32., *D'Arcy v. Ketchum*, 11 How. 165, *Clearwater v. Meredith*, 21 How. 492."

INBUSCH v. FARWELL, 1 Black. 566, 17 L. ed. 188, text p. 190-91.

See also: *Schiffer v. Anderson*, 146 Fed. 457.

These decisions we respectfully submit, are conclusive upon the question of parties in the instant case; and under them it is plainly evident that John M. Camp,

though he had not been found and served with process in the Eastern District of Virginia, cannot be considered an "indispensible party" to this proceeding, for whose non-joinder the remaining defendants would have been entitled to abate the action.

In so far as the instant case might be considered as coming within the decisions announced in *STRAWBRIDGE v. CURTIS,* 2 L. ed. 435, or *BANK v. DEVOUX,* 5 Cranch 84, we only stop to call the Court's attention to the rigid criticism to which those decisions were subjected, and the manner in which their operation was restricted and controlled in the later case of *THE L. C. & C. R. R. Co. v. LETSON,* 11 L. ed. 353, text pp. 376 and 377.

Nor can the case of *SMITH v. LYON,* 33 L. ed. 635, have any controlling weight here for the reason that the action there was *by plaintiffs in joint interest against a sole defendant,* a condition clearly not within the purview of the Act of 1839, (now section 50 of the Judicial Code); and it is evident that the Court in making its decision in that case did not take that Act into consideration, but based its judgment solely upon the act of March 3, 1887, as amended.

So far as the plea of P. D. and P. R. Camp attempted to set up any supposed privilege in their co-defendant John M. Camp of being sued in another district, it was wholly without merit; for such privilege, if any existed, was personal to John M. Camp and could be urged by him alone:

Clearwater v. Meredith, 16 L. ed. 201, 202.
Tice v. Hurley et al., 145 Fed. 391.
Schiffer v. Anderson, 146 Fed. 457, 76 C. C. A. 667.
Railway v. McBride, 35 L. ed. 659.

Their plea, to the extent that it was entitled to any consideration, was in abatement for the supposed inability of the plaintiff to bring into court the defendant John M. Camp, their joint obligor, who was claiming exemption from suit in the Eastern District of Virginia. A plea of this character usually is not considered as good unless it give the name of the omitted party, and further alleges that such party is within the jurisdiction of the court. At least this was the rule at common law, applying to the non-joinder of jointly interested defendants; for it was required that the defendant attempting to abate the suit for any such defect of parties should "give to the plaintiff a better writ", and that was the only way of making compliance with the rule. But the plea in question went to the other extreme, and undertook to show that the defendant John M. Camp was a non-resident and that the Court under no circumstances could force him to make defense in the cause. We question the right or propriety of such an objection upon the part of the defendants P. D. and P. R. Camp, where the plea of John M. Camp went not to the jurisdiction of the court, but to the privilege merely of his being sued in the district of his residence, and where the right to that privilege was undetermined. Their co-defendant, as he had a perfect right to do, might decide at any time to voluntarily submit himself to the jurisdiction of the court, waiving any exemption he might be entitled to claim. If it should have been determined that his plea of privilege was well taken and the court had also found the fact to be that he was an "indispensible party", it would then have been sufficient for the other defendants to protest against the further maintenance of the action; for the absence of an indispensible party is a defect that can be taken advantage of at any stage of the proceeding, and at first instance even on appeal. We

submit, therefore, that the plea was wholly without merit, coming at the time that it did.

But supposing that the plea of the two defendants was proper, it certainly cannot be contended that John M. Camp was a party whose interest was so indissolubly connected with that of his co-defendants that in his absence the action could not have proceeded against them. There is no doubt but that the court would have required him to be brought in, if he had been omitted and it had been suggested that he was within the jurisdiction of the court; but the mere fact that he has an interest in the subject-matter of the action and is jointly liable with his co-defendants does not signify that his interest is inseparably bound up with theirs. Their liability is not dependent upon his; nor does their liability rest for its legality and enforcement upon any right existing in favor of the plaintiff as against him which must first be established. The rights of all of the parties spring from one and the same agreement and the liabilities of all of them are measured thereby. A defense available to one is available to all, and if not available to all it cannot be asserted. The purpose to be accomplished by requiring a joinder of all of the obligors in a case of this kind is the same in law as in equity, viz: the prevention of future litigation, and the doing of complete justice in one action.

If it is true, as contended that John M. Camp is an indispensible party to this cause and that he cannot be coerced to answer the plaintiff in the Eastern District of Virginia, then it would be impossible for the plaintiff to ever litigate his rights growing out of this controversy in any Federal court, unless, forsooth, he should be able to find all of the defendants at one time in the district of his own residence and there serve them with process—a contingency which the most sanguine suitor could neither

reasonably hope for nor await. If it were possible for us to view this case by focusing our attention upon it through Section 51, to the exclusion of everything else written in the Judicial Code, then we might be able to acquiesce in the doctrine which the defendants undertake to maintain. But we very well know that a privilege conferred by law may be controlled in its exercise, restricted in its effect or entirely abrogated by the same authority that gave it birth. A field of operation is provided for both Section 50 and Section 51 of the Judicial Code, and the one is not to be given effect to the exclusion of the other, as defendants' counsel would have us do. It is the policy of the law to insure to parties litigant the right of access to the Federal courts for determination of their controversies where diverse citizenship exists and the requisite amount is involved; and we do not believe that the jurisdiction of those courts should be made to rest upon so precarious a footing as that for which defendants' learned counsel contend.

Since, (without reference to the exemption claimed), John M. Camp was in no wise an indispensible party to this action, since the necessary diversity of citizenship existed between the plaintiff and the remaining defendants, and since the requisite amount was involved, the plea of the defendants P. D. and P. R. Camp was properly stricken. The District Court committed no error in that act.

THE DISTRICT COURT HAD UNQUESTIONABLE JURISDICTION OVER JOHN M. CAMP—HE WAS NOT ENTITLED TO THE EXEMPTION CLAIMED.

The remaining question presented upon the pleadings is whether John M. Camp, a citizen and resident of

the State of North Carolina, co-obligor with the defendants P. D. and P. R. Camp, citizens and residents of the Eastern District of Virginia, having been found and served with process in said District, could be lawfully held to answer the plaintiff there, where the suit was brought, or should the action have abated as to him?

The answer to this is contained in the Act of February 28th, 1839, (now section 50, of the Judicial Code), which we have already quoted in full on page 9 of this brief, and which we would request the Court to read again in this connection.

It is our contention that under the provision of this Section of the Judicial Code, if action is brought by a citizen of one state against several defendants who are citizens of different states from that of the plaintiff, and the action is prosecuted in the district of the residence of some of the defendants, then, although the remaining defendants are citizens and residents of a state or states other than that in which the suit is brought, *if they are found and served with process within the jurisdiction of the forum selected by the plaintiff, they are bound by that service and by the judgment or decree thereafter pronounced by the court in that cause.*

In advancing this contention we do not overlook Section 51, of the Judicial Code, which in terms provides, that " * * * where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." This Section of the Code comes from the Act of March 3, 1875, as amended by the Act of August 13, 1888, which amended Act superseded Section 739 of the Revised Statutes; and the Section, as it now stands, is traceable through various changes

and enactments back to the oirginal Judiciary Act of 1789. See Act of Sept. 24, 1789, Ch. 20, 1 Stat. L. 79.

At the time of the decision in the case of *CLEARWATER v. MEREDITH et al.*, 16 L. ed. 201, the law provided that no civil action should be brought against an inhabitant of the United States, by any original process, "in any other district than that whereof he is an inhabitant, *or in which he shall be found at the time of serving the writ.*" And the words just quoted, or their equivalent, seem to have been continued in force and operative until the Act of March 3, 1887, Ch. 373, Sec. 1, was "corrected" by the Act of Aug. 13, 1888, Ch. 866, Sec. 1, at which time the quoted provision was modified into its present form, the words "or in which he shall be found at the time of serving such process or commencing such proceeding" being omitted therefrom.

It seems clear, therefore, that at the time the Act of Feb. 28th, 1839 was passed, there was a provision of the law which permitted suit to be brought or an action to be maintained against a defendant *in the district where such defendant was found.* At any rate this was the law when the Act in question came up for construction together with the 11th Section of the then Judiciary Code, before the Federal Supreme Court in the case of *CLEARWATER vs. MEREDITH et al.*, mentioned above. It is only reasonable to suppose that when the Act was carried into law Congress intended it to conform to the then existing provisions of the Judiciary Act under which it was to become operative. This is the only explanation which can be offered for the presence in the Act of 1839 of the words *"nor found within the district in which the suit is brought,"* and the subsequent expression, *"nor found within the district, as aforesaid."* These words Congress did not see fit to eliminate at the time it passed

the corrected act of August 13, 1888. Nor was any modification or omission of them made at the time of the general revision when Congress had the whole subject-matter before it in 1911, and gave to us in the Act of March 3d of that year, our existing Judicial Code. In view of this action of the Congress the words, "*nor found within the district in which the suit is brought*" appearing in Section 50, of the Judicial Code, are not to be slighted or ignored. Their presence means something—and it is the duty of the Court to make them effective. What construction, then is to be given them? It seems clear to us that when Congress continued them in force, it meant to bring forward with them so much of the existing law as was necessary to make them operative—that in cases where the action or suit was against *several defendants,* one or more of whom were not residents of the district where the suit was brought, the court nevertheless acquired proper jurisdiction of such non-resident defendants *if they were found within its jurisdictional limits and served with its process.* What other meaning could be given equally explanatory of the situation presented here? Does not the act, though in negative language, clearly provide that the judgment or decree in such cases shall be conclusive on all parties regularly served with process or voluntarily appearing to answer in the cause? This is unquestionably the construction which must be given the Section in question where the action is local:

OBER v. GALLAGHER, 23 L. ed. 829, text p. 831; and since the effect of the statute, Section 51, of the Judicial Code, relied upon by the defendants, is not to raise a barrier against the jurisdiction of the Court, but only to confer a personal privilege upon the person sued,

INTERIOR CONST. & IMP. CO. v. GIBNEY et al., 40 L. ed. 401,

CENTRAL TRUST CO. v. M'GEORGE, et al., 151 U. S. 36 L. ed. 98, text p. 100,

we respectfully submit that jurisdiction in cases of this kind is not only desirable in so far as the non-resident defendant is concerned, because it would facilitate the administration of justice by affording a full and complete remedy in one action, but the retention of jurisdiction in such cases is authorized and contemplated under the provisions of existing law. The only effect of such rule is to exclude the plea of privilege in an insignificant number of cases—but yielding a vast amount of benefit in return therefor.

The situation would be entirely different if the plaintiff and John M. Camp were the only parties litigant. In such case the action could not be maintained in the District Court for the Eastern District of Virginia although John M. Camp had been found and served with process there—unless of course, John M. Camp consented to suit in that District. This is the spirit of Section 50, of the Judicial Code.

See *SO. PAC. CO. v. DENTON*, 146 U. S., 36 L. ed. 942.

In that Section "inhabitant" means nothing more than "citizen," but was used, as is explained in *Ex parte SHAW*, "to avoid the incongruity of speaking of a citizen of anything less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in one State."

Ex parte SHAW, (s. c. SHAW v. QUINCY MINING CO.), 145 U. S. 444, 36 L. ed. text p. 770.

In *Ladew's Case*, cited and relied upon by the petitioners as controlling upon the "jurisdictional question" presented by John M. Camp, the contention was made that the suit was local, and that jurisdiction of the Federal Circuit Court was not dependent upon diversity of citizenship, but was founded upon the provisions of the eighth section of the Act of 1875. The whole controversy centered around that proposition when the case was brought to this Court upon appeal. It is to be noted that section eight of the Act just mentioned, (now Section 57, of the Judicial Code), provides for service of process upon a certain class of defendants if it shall appear that one or more of such defendants "shall not be an inhabitant of, *or found within the said district*" in which the suit is brought. In this respect the wording of Section 57 is identical with that of Section 50, of the Judicial Code. The point made by the complainants in the *Ladew Case*, therefore, was that the suit, being founded upon a claim to real estate within the meaning of the Act, the Circuit Court had jurisdiction of the defendant corporations for the reason that *they were found within the district where the suit was brought*. It is plainly evident from a reading of the opinion prepared by *Mr. Justice HARLAN*, that this Court, in affirming the action of the Circuit Court in dismissing the suit as to Tennessee Copper Company, decided nothing except that the suit was not a claim to real estate within the purview of the Act of 1875 so as to afford a basis for the jurisdiction which the complainants sought to invoke. Indeed, the Court carefully restricted its utterances to that one proposition. We quote the words of the opinion:

> " * * It is quite sufficient now to say, without discussion, that it would be a most violent construction of the 8th section of the act of 1875 to hold that

the right to have abated the nuisance in question arising from the use in Tennessee of defendant's property because, of the injurious effects upon plaintiff's real property in Georgia, creates, in the meaning of the statute, a 'claim to' real property within the district where the suit is brought. There is absolutely no foundation for such a position. * * *We only mean to say—and cannot properly go further in this case—that the statute in question does not cover this particular case*, and that the United States Circuit Court sitting in Tennessee,—the New Jersey company refusing to voluntarily appear in the suit as a defendant,—is without jurisdiction to give the plaintiffs, citizens of New York and West Virginia, the particular relief asked against that corporation." (The Italics are ours).

Ladew et al. v. Tenn. Copper Co. 54 L. ed. 1069, text pp. 1072-1073.

In other words, there was no *res* upon which the exercise of jurisdiction by the Circuit Court could be grounded. Parties alone cannot confer jurisdiction. There must be a controversy, a subject-matter within the cognizance of the court, before that court can act. That was the essential which was lacking in the *Ladew Case*. The opinion of the Court impliedly admits that if the suit had been local within the meaning of the Act, jurisdiction over Tennessee Copper Company would have attached. The decision, therefore, is in perfect harmony with our own construction of Section 50, of the Judicial Code, the wording of which, in part, is identical in substance with section eight of the Act of 1875. The fact that the Circuit Court retained jurisdiction of the British corporation is of no significance here, for the reason that an alien is subject to suit wherever found, and suits against this class of de-

fendants give rise to a branch of jurisdiction distinct within itself.

Other decisions cited and relied upon by petitioners' counsel as supporting the contention that the District Court could exercise no jurisdiction over John M. Camp may be readily distinguished from the instant case, and a detailed examination of them is unnecessary.

Unquestioned jurisdiction attached as between the plaintiff and the defendants, P. D. and P. R. Camp; for the requisite amount in value was involved and the action was brought by a citizen of Florida in the Eastern District of Virginia, of which district the said P. D. and P. R. Camp were, and are "inhabitants". The action, being upon a contract under which all the defendants were liable to the plaintiff as joint obligors, the case comes full within the provisions of Section 50, of the Judicial Code, and the construction placed by this Court upon the Act of 1839 from which the section was taken, in the case of *BARNEY v. BALTIMORE*, where, after discussing the difficulty which had been remedied by the Act, it was said that the "*plaintiff can now prosecute his suit to judgment against any one of such joint obligors, in any district where he may be found.*"

> See *Barney v. Baltimore*, 18 L. ed. (U. S.) 825, text, page 826.

The District Court was eminently correct, therefore, in holding that the defendant, John M. Camp, having been "found within the district in which the suit" was brought within the meaning of Section 50, of the Judicial Code, and therefore liable to be concluded by such judgment as might thereafter be pronounced in the cause, should be compelled to answer the plaintiff upon the merits. It was to

the interest of his co-defendants as well as of the plaintiff that he should be retained, for he would be liable in contribution to his co-obligors if upon a separate suit against them they should be compelled to discharge the plaintiff's claim. The quoted provision, "or found within the district in which the suit is brought", means today just what it meant when the Judicial Code provided that actions might be brought against a defendant in the district whereof "he is an inhabitant, or in which he shall be found at the time of the serving of the writ", as we have already pointed out;

See *Clearwater v. Meredith, supra,*

and the objection raised by John M. Camp was therefore properly resolved against him. Not being exempt from suit in the district in which he was found, the District Court could not properly do otherwise than overrule his plea.

THE CASE ON ITS MERITS.

The parties to this action, plaintiff and defendants, entered into a contract of date August 18, 1913, whereby they agreed to secure a charter for and organize a joint stock company to be known as Levy County Lumber Company. The corporation so formed was to have a capital stock of $9,000.00 and when organized, such stock was to be divided in the proportion of $2,500.00 to Gress and $6,500.00 to the Camps, in consideration of which Gress was to convey to the new corporation a certain mill plant located at or near Jacksonville, Florida, and the Camps were to convey certain timber rights located in Levy County, Florida, conveniently near the mill plant. The respective values of the two properties were $125,000.00

for the property to be conveyed by Gress and $325,000.00 for the property to be conveyed by the Camps. In paragraph 2 of the contract containing the description of the property to be conveyed to the new corporation by Gress there occurs this statement:

> "It being understood that the title to the said mill plant and property is now in Morgan Lumber Company, which will make a conveyance to the Levy County Lumber Company."

The record shows a full compliance with the terms of the contract on the part of Gress and a failure and refusal to comply on the part of the Camps. The breach of the contract by the Camps being admitted, the single question for the decision of the jury was the amount of damages sustained by Gress through the breach of the contract by the Camps. It was shown in the evidence of the plaintiff that, relying upon the contract, he had sold a large tract of valuable timber adjacent to the mill, and which had been purchased to be cut by it, and that after the sale of this property, there was little or no other timber within cutting distance of the mill to make the latter a profitable investment. It was further shown that the value of the mill as estimated in the contract was its true value as of the time of the contract, but that after the refusal of the Camps to form the new corporation and thereby join together the mill and timber, and by reason of the impossibility of obtaining a contiguous marketable supply of standing timber, the mill was no longer valuable as a going concern, and was worth practically only the amount that it would bring as a wrecking proposition. It was therefore insisted by the plaintiff that an element of damages recoverable in the action was the depreciation of the value of this property sustained by the breach

of the contract. On the other hand, it was and is contended by the defendants that since the title to the mill was not in Gress, but in the Morgan Lumber Company, the former could not claim the depreciation sustained in the mill property as a recoverable item of damages in an action instituted by him on the contract. In his evidence in chief the plaintiff, Gress, in order to show his ability to comply with the contract made by him introduced (Record pp. 38 and 39) a copy of the minutes of a meeting of the Board of Directors of the Morgan Lumber Company, as follows:

> "A contract entered into between M. V. Gress, representing the Morgan Lumber Company, and P. D. Camp, representing the Camp Manufacturing Company, of Franklin, Va., dated August, 18, 1913, whereby M. V. Gress agrees for the Morgan Lumber Company to the formation of a new corporation, to be known as the Levy County Lumber Company, capital $9,000.00; of which M. V. Gress, representing the Morgan Lumber Company, receives $2,500.00 stock valued at $125,000.00 for the Morgan Lumber Company's saw mill plant, located near Ortega; and P. D. Camp, representing the Camp Mfg. Company, receives $6,500.00 of the stock of the Levy County Lumber Company for timber holdings of the Camp Mfg. Company in Levy County, Florida; estimated amount of timber on land 140,000,000 ft. Furthermore, the Levy County Lumber Company is to pay to M. V. Gress, for Morgan Lumber Company a rental of $375.00 per month for the use of the land on which the mill is located, so long as needed for that purpose, etc.
>
> "Now, then, *BE IT RESOLVED,* that the Directors of the Morgan Lumber Company, do hereby approve the said contract in its entirety."

The contract between Gress and the Camps was under seal.

Summarized, therefore, the situation is that Gress individually entered into a sealed contract with the Camps, whereby he agreed to convey to a corporation to be formed, at an agreed price, a certain saw mill property. The contract so made was breached by the Camps. Action on the contract was brought by Gress individually against the Camps, and evidence introduced and not denied of the making of the contract, the ability of Gress to carry out his part, the loss sustained and the breach by the Camps, and the sole question for the determination of this Court is, may Gress recover in this action the depreciation sustained by the property, which under the terms of his contract he was to exchange for stock in the new corporation, notwithstanding the title to the property was in a corporation?

In the course of the trial, it was shown that Gress owned the entire capital stock of the Morgan Lumber Company. Many cases are cited in the brief of counsel for the petitioners to show that a stockholder of a corporation may not maintain in his own name an action for the benefit of the corporation; in other words, that a wrong committed against the corporation must be prosecuted in its own name. Giving to these decisions the widest possible latitude, it is respectfully insisted that they have no application to the facts in this case. In each such case the right sought to be asserted was a right which accrued to the corporation in its corporate capacity, and as to which there was no privity between the stockholder attempting to assert such right and the defendant who had committed the wrong, and in each such case the right asserted was one which could be and could only be asserted by the corporation itself. The differences between these

cases and this are apparent at a glance. In this case there was no privity between the corporation and the Camps, and the contract here being a sealed instrument, the Morgan Lumber Company, even if it be admitted to have been the undisclosed principal, could have maintained no action on it.

Summarized, therefore, the question is this:

The petitioners insist that "the vital question presented by the record is whether a plaintiff, suing in his individual right, can recover damages caused by depreciation in value of the property of a corporation of which corporation he owns the entire capital stock."

To which we reply:

FIRST: The verdict and judgment may be sustained, in view of the state of the pleading and the proof, upon the theory that the injury suffered by the defendant in error was for depreciation in the value of *his stock in Morgan Lumber Company* and he being the owner of the *entire stock,* it follows that the depreciation in the value of his stock interest in the corporation was measured and illustrated by the depreciation in the value of the properties of the corporation.

SECOND: The respondent, *Morgan V. Gress,* made a contract: He made it under seal: At common law he was the *only party* who could sue and recover damages for its breach. Even if, under the present state of the law, he is not the *only party* who could sue on a contract under seal, he is undoubtedly a proper party authorized to sue.

Under an abundance of authority it may be safely asserted that Gress was the proper party plaintiff in this action for a breach of the contract, and we further insist

that, if in the trial it appeared that in the making of the contract he acted for an undisclosed principal, that fact will neither bar the action nor change the measure of damages.

In Virginia and in the Federal Court it has been so frequently held as not to require citation, that where an agent is contracted with by deed in his own name, his principal cannot sue upon it. *Dicey on Parties,* p. 134 and cases cited; *Storey on Agencies,* Sec. 422; *Portsmouth v. Oliver Co.,* 109 Va. 513; *Willard v. Wood,* 135 U. S. 309.

It is equally well established that where a contract *not* under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it. *Portsmouth v. Oliver,* 109 Va. 513; 3rd Rob. Prac. (new) 34. In either aspect, therefore, whether the contract be a sealed or unsealed instrument, Gress was the proper party plaintiff.

And there is nothing in Sec. 2415 of the Virginia Code which affects this right. The Section provides that if a covenant or promise be made for the sole benefit of a person with whom it is not made, such person may maintain in his own name any action thereon which he might maintain in case it had been made with him, but it has been held in Virginia that this statute does not enable one who is not himself a party to a deed or to a contract under seal to maintain an action thereon unless he is plainly designated by the instrument as the beneficiary and the covenant or promise is made for his sole benefit. *Newberry Co. v. Newberry,* 95 Va. p. 120. If therefore it be true, as it needs must be, that Gress was, under the circumstances here, the proper party plaintiff, can it be contended that the undisclosed principal, if this Court should be of opinion that the contract was made by Gress as the agent of the Morgan Lumber Company, should be denied the

privilege of recovering damages actually sustained by the breach of a contract made for its benefit? We insist that the correct interpretation of the law is that laid down in Sec. 2048 of *Mechem on Agency, Second Edition,* where the author says: "Where the action is brought by the agent upon the contract which he has made, he may, unless the principal intervenes, recover the full measure of damages for its breach, in the same manner as though the action had been brought by the principal." Under such circumstances, the author says the Court would treat the recovery as made for the benefit of the principal.

A case in point is *Shelby v. Burrow* (Ark.) 89 S. W. 464. In that case Burrow contracted in writing with Shelby for the purchase of 100 bales of cotton. At the time the contract was entered into no principal was disclosed to Shelby, and the latter thought and believed he was selling the cotton to Burrow personally. Shelby failed to deliver the cotton and Burrow brought his action to recover damages sustained in the non-performance. It developed that Burrow was acting as agent for the Moose Gin Company, and the damages sustained were sustained by the latter company. Shelby insisted that this made the contract void and that Burrow could not maintain the action. Answering this contention, the Court said, "He (the agent) can sue upon the contract, and can, unless the principal intervenes, recover the full measure of damages for its breach, in the same manner as though the action had been brought by the principal," citing *Mechem on Agency* Sec. 755-763; *Clark & Skyles on Law of Agencies,* pp. 1331-1341. It was therefore held that, notwithstanding Burrow was merely the agent and the damages were sustained by his principal, that he might sue and recover just as fully as his principal could have recovered, if the contract had been made with the latter.

In the case of *National Bank v. Nolting,* 94 Va. 263, a suit was brought by W. O. Nolting against the National Bank of Va. In the trial Nolting testified that he was the cashier of Davis & Gregory and that Davis & Gregory were the real plaintiffs and entitled to the recovery sought to be obtained in the case. The suit was to recover a balance claimed to be due to Davis & Gregory from the bank, withheld by reason of the payment by the bank of a check claimed to have been illegally raised. After the evidence recited above was introduced, the defendant moved to dismiss the case, because it had been brought in the name of the wrong plaintiff, but the Court below allowed a recovery.

The Virginia Court of Appeals in passing on the objection to the form of action said, "The plaintiff, in keeping the account with the defendant, and in bringing suit to recover the alleged balance, was acting as agent, and it is well settled that where a contract not under seal is made with an agent, and in the agent's name for an undisclosed principal, either the agent or principal may sue upon it."

In the case of *Carter v. Southern Railway Co.* (Ga.) 36 S. E. 308, which was an action for damages resulting from a breach of contract for a shipment of merchandise, the action was brought in the name of an agent, the evidence in the trial developing the fact that the goods belonged to the wife of the plaintiff. The lower court, upon motion of defendant, granted a non-suit on the ground that the damages sustained accrued not to the plaintiff, but to his wife, and that she and not he was the proper plaintiff. The Supreme Court of Georgia in reversing the action of the lower court said:

> "The courts of both this country and England are now, with a few exceptions, all agreed that, where

the consignor makes a contract of shipment with the carrier, he may bring an action for loss of or injury to the consignment, although he may not be the actual owner of the property. In such a case the privity of contract between the carrier and the consignor is a sufficient foundation on which to base the action. It is also well settled by the authorities that where a consignor, who is himself not the real owner, recovers damages from the carrier for a breach of the contract of carriage, the recovery inures to the benefit of the owner, and the consignor is regarded simply as the trustee of an express trust."

The case of *Simons v. Witner* (Mo.) 88 S. W. 791, is illustrative of the point now being made. There the action was for damages alleged to have accrued to the plaintiff by reason of defendant's breach of a contract to erect a building. The contract was in writing, but not under seal. The evidence disclosed the fact that the land on which the buildings were to be erected belonged to the wife of the party in whose name the contract was made, and that the contract was made for her benefit and the buildings when erected were to be paid for by her. It was contended by the defendant that, inasmuch as the wife of the plaintiff owned the land upon which the buildings contracted for were to be erected, any damages resulting from a breach of such contract would be damages accruing to her and not to the plaintiff. The Court, after quoting the Missouri statute, in which a husband is declared under certain circumstances to be the agent of his wife, held that, entirely aside from the statute, an agent of an undisclosed principal might maintain a suit of this character in his own name, and that damages sustained by the owner could be recovered by the agent, who would be treated as the trustee of the undisclosed principal.

We respectfully insist that in principal there is no difference between the recovery sought in that case, or the element of damages asserted, than in the instant case, admitting the position taken by the petitioners that Gress was in fact an agent and not the principal, to be true and established.

Substantially the same point was decided by the Supreme Court of Georgia in the case of *Groover v. Warfield,* 50 Ga. 645. In that case the agent of the owner sold a large quantity of cotton at an agreed price, the contract was broken by the purchaser and suit was instituted by the agent to recover the difference in the selling price and the value as of the agreed date of delivery. The point was made that, since the damage accruing was not sustained by the agent, that he could not maintain a suit for this damage in his own name and the trial court so decided, holding that the agent could recover only the amount of the commissions which he would have earned if the contract had been completed. The Supreme Court of Georgia, reversing the action of the lower court, held that where an agent sells cotton consigned to him, he may in his own name recover the damages resulting from a breach of the contract by the buyer, although he may be bound to pay over the same, when recovered, to the owner of the cotton.

It is for the reasons stated above, insisted:

First, that the judgment of the lower court should be affirmed upon the theory that the pleadings and proof established clearly the beneficial interest of the respondent in the stock representing the properties of Morgan Lumber Company; the depreciation in the value of the properties of that corporation occasioned by a breach of the contract sued on and corresponding diminution in the

value of the stock of Morgan Lumber Cmpany, held and owned in its entirety by the respondent. This view of the case can be taken without controverting the argument or authorities relied on by the appellants. The declaration filed in the case did not attempt to argue the case, but stated the facts; including the statement of the depreciation in the value of the properties of the corporation and the ownership of all the stock by the defendant in error. The presumptions are all in favor of the validity of the verdict and judgment, and if, therefore, there is any theory upon which it can be sustained, applying the pleadings to the proof, it ought not to be set aside.

If, however, it cannot be fairly said that one of the elements of damages of the respondent was the depreciation in the value of his stock, representing the properties of Morgan Lumber Company, we confidently insist, second, that the contract in question having been made by the respondent and *made under seal,* and apparently made in the interest and in behalf of Morgan Lumber Company, was a contract on which the respondent could have sued in his own name; and perhaps, as under the common law rule, was the only party who could have maintained the suit, and that the recovery should and must include such damages as were shown to have been sustained by that company by means of the wrongful breach of the contract.

The suggestion that, even if this be true, Gress is entitled to recover only so much of this depreciation as his interest in the new company bears to the whole, is so patently without merit that it is almost idle to discuss it. The plant which Gress was to put into the new corporation was shown by the evidence to be worth $125,000.00 from the day of the contract to the day of the breach, and it was the breach of the contract, i. e., the refusal of Camp to form the new corporation, whereby the plant would

have been coupled up to a valuable piece of timber, that caused the damages. Gress himself, as the owner of all the stock of the Morgan Lumber Company, or as the owner of the fee in the properties, sustained the damage and all the damage and since the intent of the law under such circumstances is to make the injured party as nearly whole as is susceptible through damages, to charge him with a part of his own loss is, to say the least, a remarkable proposition, sustained by neither reason nor by authority.

A general view of the entire case discloses the following: The subject-matter and terms of the contract were clearly shown, for the contract sued on was in writing and under seal and not controverted. The breach of the contract is positively established by the testimony of the plaintiff, strongly corroborated by the correspondence passing between the parties, and embodied in the transcript of the record; and finally established and confirmed by the admission of one of the defendants, P. R. Camp, who on page 76 of the Transcript is shown to have testified, referring to himself and his co-defendants, in a conference with Morgan V. Gress at Franklin, Virginia: "They told Mr. Gress that they would not carry out that contract." It may reasonably have been assumed, and it was clearly established that there was heavy depreciation in the property and interests proposed to be contributed by the plaintiff Gress in the organization of the Levy County Lumber Company; and on the other hand there was an admitted enhancement in the value of the properties which the Camps contracted to convey to the Levy County Lumber Company, but which, contrary to their engagement, they sold at an advanced value and pocketed the profit. Gress was always willing and anxious to do and have done everything required of him by the

contract. It may again be observed in this connection that there was ample evidence to justify a finding by the jury that the interest of Morgan V. Gress in the enhanced value of the Camps timber holdings amount to *more than the verdict rendered in this case.*

The petitioners were fully advised as to the exact interest of the respondent in the properties which were the subject of the contract. They were undoubtedly answerable to *him* and he to them for all damages resulting directly from a breach of that contract, either upon the theory that his interest in the property or securities of Morgan Lumber Company suffered by the breach, or upon the theory that he acted for Morgan Lumber Company, and being a proper party plaintiff, should recover for Morgan Lumber Company damages resulting from the breach of the contract.

In support of the proposition that if the District Court had no jurisdiction of John M. Camp the judgment as to him would be a nullity not affecting the judgment rendered against his co-defendants, we cite the case of *GRAY v. STEWART,* 33 Gratt. (Va.) 351, 358, from the opinion in which case we quote the following:

> "It is true that at common law when the action is joint, whatever operates as a discharge of one joint obligor or promissor accrues to the benefit of all, and must discharge all, unless the matter pleaded is personal in discharge of one, such as bankruptcy, infancy, etc. And where, too, a judgment is erroneous as to one and is reversed as to one, when the judgment is joint, it must be reversed as to all. Execution must issue against all or none. This is undoubtedly the common law rule. As to how far or whether at all, this rule has been changed by statute it is not necessary to determine in this case. The judgment against Preston was not an erroneous judgment; but

it was a void judgment. There is a manifest distinction between an erroneous judgment and a void judgment. The first is a valid judgment though erroneous, until reversed, provided it is the judgment of a court of competent jurisdiction. The latter is no judgment at all. It is a mere nullity. The first cannot be assailed in any other court but an appellate court. The latter may be assailed in any court anywhere, whenever any claim is made or rights asserted under it.

"In the case before us the judgment against Preston was a void judgment, a mere nullity. It is conceded that no process was ever served upon him, and that he had no notice of any proceedings against him before judgment was obtained. So far as Preston was concerned the court had no jurisdiction, and the judgment was void *in toto;*

"Therefore it follows that the defendant Preston never having had notice, and in fact never being before the court, the judgment entered against him is no judgment at all, and he must be regarded as out of the case, and the joint judgment against him, Heiskell and Grey, must be regarded as only a judgment against Grey and Heiskell."

The quotation in the Grey case was approved in the case of Staunton v. Hayden, 92 Va. 201-209, in which a judgment obtained on a summons executed on an officer of a corporation in a county other than that wherein the suit was brought, and not served ten days before the return date, was held to be a void judgment—"a nullity."

We respectfully submit that the petition for the writ of certiorari shows nothing which ought to be brought to this Court for review and should be denied.

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